COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SJC-12226

CRISTINA BARBUTO,
Plaintiff-Appellant,

v.

ADVANTAGE SALES & MARKETING LLC and
JOANNE MEREDITH VILLARUZ,
Defendants-Appellees.

On Appeal from a Judgment of the Suffolk Superior Court

BRIEF *AMICI CURIAE* OF MASSACHUSETTS EMPLOYMENT LAWYERS ASSOCIATION, AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS, GLBTQ LEGAL ADVOCATES & DEFENDERS, MENTAL HEALTH LEGAL ADVISORS COMMITTEE, AND UNION OF MINORITY NEIGHBORHOODS IN SUPPORT OF PLAINTIFF-APPELLANT

David A. Russcol (BBO #670768)
Zalkind Duncan & Bernstein LLP
65a Atlantic Avenue
Boston, MA 02110
(617) 742-6020
drusscol@zalkindlaw.com

Chetan Tiwari (BBO #692912)
Mental Health Legal Advisors Committee
24 School Street, Suite 804
Boston, MA 02108
617-338-2345 x 132
ctiwari@mhlac.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Regulations

Constitutional Provisions

ISSUES PRESENTED

1. Whether an employer violates the rights of an employee to be free of discrimination based on handicap by refusing to consider accommodating an employee's off-site medical use of marijuana to treat a debilitating medical condition, as authorized by St. 2012, c. 369, and by terminating the employee for such use of marijuana.
2. Whether St. 2012, c. 369, and its implementing regulations permit a private right of action in cases where an individual alleges deprivation of rights secured by the Massachusetts Constitution and/or statutes protecting residents of the Commonwealth from discrimination on the basis of a disability.

INTERESTS OF AMICI CURIAE

Massachusetts Employment Lawyers Association (MELA) is a voluntary membership organization of more than 150 lawyers who regularly represent employees in labor, employment, and civil rights cases in Massachusetts. MELA is an affiliate of the National Employment Lawyers Association (NELA), the country's largest organization of lawyers who represent

employees and applicants with workplace-related claims (approximately 3,000 attorneys).

MELA's members actively advocate for the rights of employees before the executive, legislative and judicial branches. MELA has filed numerous *amicus curiae* briefs in cases before the Appellate Courts of Massachusetts, including: Gyulakian v. Lexus of Watertown, Inc., 475 Mass. 290 (2016); Verdrager v. Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., 474 Mass. 382 (2016); Bulwer v. Mount Auburn Hosp., 473 Mass. 627 (2016); Psy-Ed Corp. v. Klein, 459 Mass. 697 (2011); Gasior v. Mass. Gen. Hosp., 446 Mass. 645 (2006); and Ayash v. Dana-Farber Cancer Inst., 443 Mass. 367 (2005).

The **American Civil Liberties Union of Massachusetts (ACLUM)**, an affiliate of the American Civil Liberties Union, is a non-partisan, non-profit organization of over 50,000 members and supporters. From its founding, ACLUM has worked to defend the civil rights and civil liberties established by state and federal laws and constitutions. ACLUM was a member of the coalition that advocated for the passage of Question 3, the medical marijuana law approved by the voters, whose meaning is at issue in this appeal. In

addition, ACLUM has participated in cases relevant here, including: Webster v. Motorola Corp., 418 Mass. 425 (1994) (drug testing of employees); Commonwealth v. Cruz, 459 Mass. 459 (2011) (marijuana decriminalization law); Flagg v. AliMed, Inc., 466 Mass. 23 (2013) (disability discrimination in the workplace).

Founded in 1978, **GLBTQ Legal Advocates & Defenders (GLAD)** is New England's leading public interest legal organization dedicated to ending discrimination based on sexual orientation, HIV status and gender identity and expression. GLAD has litigated widely in New England in both state and federal courts in all areas of the law in order to protect and advance the rights of lesbians, gay men, bisexuals, transgender individuals and people living with HIV and AIDS.

GLAD's history includes litigating and providing amicus support in a wide range of anti-discrimination and employment matters. See, e.g., Muzzy v. Cahillane Motors, Inc., 434 Mass. 409 (2001) (amicus brief addressing appropriate level of specificity of jury instruction on "reasonable person" standard in same-sex sexual harassment case); Melnychenko v. 84 Lumber

Co., 424 Mass. 285 (1997) (amicus brief arguing that same-sex sexual harassment is prohibited by Chapter 151B regardless of the sexual orientation of the parties); Bragdon v. Abbott, 524 U.S. 624 (1998) (establishing that people with HIV are protected under the Americans with Disabilities Act); Rosa v. Park West Bank & Trust Co., 214 F.3d 213 (1st Cir. 2000) (holding that transgender person denied opportunity to apply for loan may state sex discrimination claim under Equal Credit Opportunity Act). GLAD has an enduring interest in ensuring that employees receive full and complete redress for the violation of their civil rights in the workplace.

The **Mental Health Legal Advisors Committee (MHLAC)** was established by the General Court in 1973 under the jurisdiction of the Supreme Judicial Court. G.L. c. 221, § 34E. MHLAC provides advice and assistance to individuals with mental illness, to their families, and to other attorneys. One aspect of its obligations is to monitor legal issues before the courts affecting the interests of individuals with mental health disabilities. MHLAC has served as amici in numerous cases involving the rights of such

persons,[1] utilizing the expertise gained from more than forty years of advocacy.

MHLAC has been a proponent of community-based care and inveighed against undue segregation of its clients. Since persons with psychiatric concerns will respond or not to a wide range of different treatment modalities, inclusion is best accomplished by providing a wide range of alternatives. Studies have indicated that medical marijuana can be effective in treatment of mental health conditions such as depression and bi-polarity. It is among the range of alternatives that ought to be available to MHLAC

[1] These include: In re G.P., 473 Mass. 112 (2015) (procedural and substantive due process rights in proceedings for civil commitment for alcohol or substance abuse); Walden Behavioral Care v. K.I., 471 Mass. 150 (2015) (rights against self-incrimination in civil commitment proceedings); Guardianship of Erma, 459 Mass. 801 (2011) (due process in cases involving forced treatment with antipsychotic medications); Kenniston v. DYS, 453 Mass. 179 (2009) (standard of proof required for civilly committing juveniles within the juvenile justice system under G.L. c. 120); Boston Hous. Auth. v. Bridgewaters, 452 Mass. 833 (2009) (reasonable accommodations in public housing appeals process); Newton-Wellesley Hosp. v. Magrini, 451 Mass. 777 (2008) (emergency hearings access for involuntarily committed mental health patients); Andrews v. Bridgewater State Hosp., 449 Mass. 587 (2007) (standard of proof for an applicant in a substituted judgment treatment proceeding under G. L. c. 123, § 9 (b)); and Loffredo v. Ctr. for Addictive Behaviors, Inc., 426 Mass. 541 (1998) (whether there is a private right of action in a case challenging a drug treatment clinic's denial of patient admission).

clients, who should not be forced to choose between gainful employment and prescribed medicine. Indeed, persons with mental illness or the potential for it fare significantly better when they are able to work and avoid poverty. MHLAC therefore advocates against workplace discrimination and seeks to enforce employers' obligation to provide reasonable accommodations to employees with disabilities.

The **Union of Minority Neighborhoods ("UMN")** is a Boston-based community organization founded in 2002 to increase activism, empowerment, and opportunity in communities of color. UMN provides skills training to community activists and technical assistance to community based organizations in a number of areas, including housing, employment, CORI reform, economic development and voting rights. UMN has organized and led successful coalitions that include labor organizations, non-profits, government agencies, and businesses, to address issues that directly affect communities of color, including issues of discrimination in employment. UMN's efforts are designed to strengthen our democracy and re-build communities of color. In these efforts, it is of critical importance to UMN that the laws enacted to

secure equal rights and opportunities remain meaningful tools in the eradication of discrimination in this Commonwealth. UMN has joined in numerous *amicus curiae* briefs advocating for the broad interpretation of these protective statutes. See, e.g., Joulé, Inc. v. Simmons, 459 Mass. 88 (2011); Psy-Ed Corp. v. Klein, 459 Mass. 697 (2011); Thurdin v. SEI Boston, LLC, 452 Mass. 436 (2008). Allowing employers to discriminate against qualified individuals with serious medical conditions simply because the medically-recommended treatment for their condition is the state-permitted off-site use of marijuana would erode statutory and constitutional protections against workplace discrimination, to the detriment of communities UMN serves and to the detriment of the Commonwealth.

INTRODUCTION

Massachusetts employees who are authorized by statute to use marijuana for relief from debilitating medical conditions should be protected from adverse employment actions as long as their off-site marijuana use does not prevent them from performing all essential job responsibilities. For purposes of G.L. c. 151B, § 4, medical marijuana should be treated the

same as any other medical treatment for a disabling condition, with the only exceptions being those explicitly provided in the Medical Marijuana Law, St. 2012, c. 369 (such as the provision allowing employers to prohibit on-site use at a workplace). To do otherwise would penalize medical marijuana users, contrary to the expressed will of the voters who enacted the Medical Marijuana Law, and would deprive handicapped individuals seeking medical treatment of the rights and privileges secured by the state constitution and by statute. Depriving qualifying patients of protection against discrimination would force them into the unconscionable choice of giving up what may be the most effective medical treatment, which the voters have decided they should be able to use, or rendering themselves unemployed and possibly unemployable. Some such patients might turn instead to highly addictive opioids, which the proponents of the Medical Marijuana Law specifically sought to avoid. This Court should not permit employers to intrude into their employees' medical decision-making by rejecting a treatment that is authorized by the state and recommended by medical professionals.

Accordingly, terminating an employee in the Plaintiff's circumstances violates G.L. c. 151B, § 4.

In order to resolve this appeal, this Court need only hold, and should hold, that relaxing drug testing or other requirements in order to permit off-site medical marijuana use consistent with state law may be a reasonable accommodation for disabilities under G.L. c. 151B. Such a holding would enable issues relating to medical marijuana to be evaluated and adjudicated within the existing, well-established framework for claims of discrimination on the basis of handicap. Rather than categorically excluding users of medical marijuana from the protections of G.L. c. 151B, this approach would allow a case-by-case assessment so that qualifying patients could be accommodated when appropriate, so long as no undue hardships prevent accommodation. This interpretation of the law would promote the strong public policy of the Commonwealth prohibiting discrimination against those with disabilities, as embodied in G.L. c. 151B, G.L. c. 93, § 103, and art. 114 of the Amendments to the Massachusetts Constitution, as well as the intent of the voters in authorizing medical marijuana use.

In addition to G.L. c. 151B, sources for a private right of action include G.L. c. 93, § 103 (the Massachusetts Equal Rights Act, or "MERA"); art. 114 of the Massachusetts Constitution; and the public policy underlying these provisions in conjunction with the Medical Marijuana Law. Under art. 114 of the Massachusetts Constitution, which is privately enforceable in the absence of a statutory mechanism for relief, see Layne v. Superintendent, Mass. Correctional Inst., Cedar Junction, 406 Mass. 156, 159-60 (1989), citizens of the Commonwealth have rights to reasonable accommodations for their handicaps. The Medical Marijuana Law provides that a medicinal marijuana user may not be "denied any right or privilege." St. 2012, c. 369, § 4. An employer who refuses to make such accommodations has denied these rights to the affected employee, in violation of St. 2012, c. 369, § 4. Terminating an employee with a disability who uses medical marijuana, outside the workplace, to relieve symptoms violates the public policy of the Commonwealth in protecting those with disabilities from invidious discrimination and allowing marijuana to be a viable medical treatment. The Court should further that policy by making clear

that because a patient's permitted use of marijuana shall not be grounds to deprive that individual of any of his or her "rights or privileges," the Medical Marijuana Law permits a private right of action under existing statutes like G.L. c. 151B or MERA, where available, or where they are not available, under art. 114 or the common law. To hold otherwise would be inconsistent with the plain terms of the Medical Marijuana Law.

STATEMENT OF THE CASE

Amici adopt the Statement of the Case as set forth in the Appellant's opening brief.

STATEMENT OF FACTS

Amici adopt the Statement of the Facts as set forth in the Appellant's opening brief.

SUMMARY OF ARGUMENT

Existing law, and in particular G.L. c. 151B, § 4, guarantees a qualified employee's right to a reasonable accommodation for a handicap, and this right should apply equally to those who use marijuana for medical purposes under the Medical Marijuana Law.

(pp. 14-18) This Court should consider persuasive opinions from courts in other jurisdictions and treat medical marijuana like any other corrective measure, to avoid forcing disabled employees to choose between medical care and employment. (pp. 18-25) While a G.L. c. 151B claim may have been foreclosed when medical marijuana use violated state law, the enactment of the Medical Marijuana Law removed those impediments to accommodating off-site use and established a public policy in favor of allowing qualified patients to use marijuana instead of more addictive drugs like opioids. (pp. 25-29) Therefore, employers should not be able to categorically exclude medical marijuana users from employment, but must give individualized consideration to possible accommodations. (pp. 29-31)

Because the Medical Marijuana Law precludes qualifying patients from being "penalized under Massachusetts law in any manner, or denied any right or privilege," their medical marijuana use cannot divest them of the rights and remedies available under G.L. c. 151B and other statutes. (pp. 31-32) Authority from other jurisdictions supports this conclusion. (pp. 32-34) Decisions from other

jurisdictions finding no cause of action on similar facts are distinguishable and not persuasive because they involve materially different medical marijuana statutes, do not involve a freestanding claim for disability discrimination, or both. (pp. 34-37) As this Court has done in the criminal context, it should effectuate the will of the voters by reading the Medical Marijuana Law broadly in context of existing antidiscrimination law. (pp. 37-38) Accordingly, this Court should hold that an employer must consider accommodating off-site medical marijuana use on an individualized basis, within the framework of G.L. c. 151B. (pp. 38-39)

Because the Medical Marijuana Law preserved the rights of qualified patients, it should be interpreted to supplement and interact with existing statutory and constitutional avenues of relief, such as G.L. c. 151B, the Massachusetts Equal Rights Act, and art. 114 of the Amendments to the Massachusetts Constitution. (pp. 40-42) This Court should clarify that those causes of action remain available to medical marijuana users, and need not address the existence or scope of a separate, implied right of action under the Medical Marijuana Law or regulations. (pp. 42-43)

ARGUMENT

I. A Qualified Employee Is Entitled Under G.L. c. 151B, § 4, to Reasonable Accommodations, and An Employer Must Make an Individualized Analysis of A Request Relating to Off-Site Use of Medical Marijuana, Like Any Other Requested Accommodation for a Disability.

When the people of the Commonwealth enacted the Medical Marijuana Law by initiative petition, they intended to remove obstacles to the use of a substance with medical potential to treat a defined category of "[d]ebilitating medical condition[s]." St. 2012, c. 369, § 1(C). See Information for Voters: 2012 Ballot Questions, Question 3: Law Proposed by Initiative Petition, Medical Use of Marijuana (in argument submitted by Committee for Compassionate Medicine, urging a yes vote to "ease the suffering of thousands of people with . . . debilitating conditions").[2] In addition to protecting qualified patients from "arrest or prosecution, or civil penalty, for the medical use of marijuana" pursuant to the Medical Marijuana Law, St. 2012, c. 369, § 4, the people also wrote more broadly: "Any person meeting the requirements under

[2] See Commonwealth v. Cruz, 459 Mass. 459, 470 (2011) (looking to arguments in voter information guide to ascertain legislative intent of voters).

this law shall not be penalized under Massachusetts law in any manner, or denied any right or privilege, for such actions." Ibid. (emphasis supplied). Although the statute states that marijuana use need not be accommodated "in any workplace," St. 2012, c. 369, § 7(D), the exception for on-site use does not authorize discrimination based on medical marijuana use outside the workplace. Enabling such discrimination would create barriers to the workplace for qualified applicants and employees based simply upon their medical need for treatment of a disability, contrary to the voters' intent to protect those individuals. Instead, this Court should implement the public policy adopted by the voters by applying the existing constitutional and statutory protections for handicapped individuals to people like the Plaintiff.

a. Terminating Employees for Medical Marijuana Use Violates G.L. c. 151B, § 4 Because Accommodating Off-Site Use of Marijuana Is Not Inherently Unreasonable, And Therefore Employers May Not Reject Requests for Accommodation Categorically.

General Laws c. 151B was enacted after World War II in order to "provide remedies for employment discrimination, a practice viewed as harmful to our democratic institutions and a hideous evil that needs

to be extirpated." Flagg v. AliMed, Inc., 466 Mass. 23, 28 (2013) (quotations omitted). "[T]he Legislature determined that workplace discrimination harmed not only the targeted individuals but the entire social fabric." Id. at 29. Accordingly, in banning employment discrimination, the Legislature required that c. 151B "be construed liberally for the accomplishment of its purposes," and further stated that "any law inconsistent with any provision of this chapter shall not apply." G.L. c. 151B, § 9. This Court has described the public policy of the Commonwealth against discrimination as "dominant" and an "overriding governmental policy." Massachusetts Bay Transp. Auth. v. Boston Carmen's Union, Local 589, 454 Mass. 19, 26 (2009). Although G.L. c. 151B has cognates at the federal level and in other states, this Commonwealth has frequently been ahead of the curve in defending members of protected classes and in going beyond the limits of federal law. See Cuddyer v. Stop & Shop Supermarket Co., 434 Mass. 521, 536-37 (2001) (citing numerous examples of more expansive protections under G.L. c. 151B).

The disability (or handicap) protections in the law were enacted in 1983, in the wake of the 1980

passage of art. 114 of the Amendments to the Massachusetts Constitution, which enshrined a right to be free from handicap discrimination in the state constitution. See Dahill v. Police Dep't of Boston, 434 Mass. 233, 240-41 & n.12 (2001). This Court has described these enactments as "recognition that persons who are physically or mentally impaired are nevertheless capable of becoming productive and successful members of the workforce." Id. at 241. The Court went on: "We construe G.L. c. 151B, § 4, to give the fullest effect to that recognition." Ibid.

Under G.L. c. 151B, § 4(16), a "qualified handicapped person" is protected from termination or other discrimination based on handicap. See generally Godfrey v. Globe Newspaper Co., Inc., 457 Mass. 113, 119-20 (2010). A "handicapped person" is anyone with a "physical or mental impairment which substantially limits one or more major life activities," who has a record of such impairment, or who is regarded as having such an impairment. G.L. c. 151B, § 1(17, 19).[3]

[3] Given the requirement in the Medical Marijuana Law that a qualifying patient suffer from a "[d]ebilitating medical condition," St. 2012, c. 369, § 1(C), it is highly likely that all or nearly all medical marijuana patients meet at least one of these prongs and qualify for protection under G.L. c. 151B.

Such an individual is "qualified" if he or she can perform the essential functions of a position with or without reasonable accommodations. G.L. c. 151B, § 1(16). Accommodations are only restricted if they impose an undue hardship on the employer. G.L. c. 151B, § 4(16). Once on notice of a possible need for an accommodation, an employer must engage in an individualized, interactive process to determine whether and how an employee's handicap may be accommodated. See Ocean Spray Cranberries, Inc. v. Massachusetts Comm'n Against Discrim., 441 Mass. 632, 644 (2004).

Effectuating the will of the voters in passing the Medical Marijuana Law requires treating an accommodation sought for medical marijuana use no differently than any other therapy for a medical condition, such as insulin use or dialysis for diabetes or opiates for chronic pain. Other states, such as New Mexico, have recognized that in order to give full effect to a law legalizing the medical use of marijuana, such use must be treated like other legal forms of medical treatment. See Vialpando v. Ben's Automotive Services, 331 P.3d 975, 977-79 (N.M. App. 2014) (authorizing reimbursement for medical

marijuana under worker's compensation law in order to effectuate intent of medical marijuana law); Lewis v. American Gen. Media, 355 P.3d 850, 856-58 (N.M. App. 2015) (rejecting challenge to reimbursement for medical marijuana based on federal preemption); cf. Maez v. Riley Indus., 347 P.3d 732, 735-37 (N.M. App. 2015) (finding sufficient evidence that medical marijuana was medically necessary). Addressing the employment context, the court in Vialpando read a worker's compensation statute requiring an employer to provide "reasonable and necessary" medical services together with the medical marijuana statute, which stated it was intended "to allow the beneficial use of medical cannabis in a regulated system for alleviating symptoms caused by debilitating medical conditions . . . ." 331 P.3d at 979. The court concluded that the medical marijuana statute added onto the existing worker's compensation scheme by creating a program for medical use of marijuana, which could then be used by injured or disabled workers. See ibid.

In New Mexico, as in Massachusetts, the worker's compensation system is designed to allow injured employees to receive prompt and effective treatment so

that they can return to the workplace as soon as possible. Similarly here, the Medical Marijuana Law permits the use of marijuana by those with debilitating conditions when medically needed. With access to effective treatment, the law allows individuals with debilitating medical conditions to enter or re-enter the workforce. As with all other individuals protected by art. 114 and statutes ensuring that workplaces remain free from discrimination based on disability, these individuals also require certain accommodations. The need for such accommodations can and should be addressed within the structure of existing law under G.L. c. 151B (and, where relevant, under similar statutes such as G.L. c. 93, § 103), and employees with disabilities should not be penalized for using a legal medical therapy for their conditions.

Two justices of the California Supreme Court would have similarly applied California's existing disability discrimination statute in light of that state's new medical marijuana law, even though California's statute is more narrowly drafted than the Medical Marijuana Law. See Ross v. RagingWire Telecomm'ns., Inc., 174 P.3d 200, 212 (Cal. 2008)

(Kennard, J., concurring and dissenting) (rejecting "the proposition that a requested accommodation can never be deemed reasonable if it involves off-duty conduct by the employee away from the jobsite that is criminal under federal law, even though that same conduct is expressly protected from criminal sanction under state law." [emphasis supplied]). Even though, unlike the more expansive language of the Medical Marijuana Law, the California statute only precluded "criminal prosecution or sanction" for medical marijuana use, id. at 210 (quoting from Cal. Health & Safety Code § 11362.5(b)(1)(B)), Justice Kennard and one colleague would have followed the framework of the California cognate to G.L. c. 151B, requiring a specific showing that accommodations related to medical marijuana would create an undue hardship materially affecting the employer's business operations. See id. at 212-13. The two justices concluded that such a holding was necessary to avoid putting disabled individuals to a "cruel choice" of forfeiting employment or forgoing effective treatment for serious medical conditions, which is exactly the type of outcome that anti-discrimination law is aimed at preventing when other forms of medical treatment

are at issue. See id. at 211. The majority, in contrast, repeatedly noted that the California medical marijuana statute provided only "immunity to criminal liability" and that its proponents had focused on the narrow scope of the statute by arguing that it "simply gives those arrested [for marijuana offenses] a defense in court . . . ." Id. at 206 (majority opinion). Because of the California statute's exclusive focus on criminal sanctions, the majority refused to require employers to accommodate medical marijuana use. See id. at 204. This rationale does not apply to the Commonwealth's Medical Marijuana Law, which goes beyond mere decriminalization to eliminate civil liability, prohibit penalties "under Massachusetts law in any manner," and ban denial of "any right or privilege." St. 2012, c. 369, § 4.

This Court should adopt Justice Kennard's suggestion as consistent with the broad disability protections of G.L. c. 151B, and the text and intent of the Medical Marijuana Law. This Court must assume that the Medical Marijuana Law was passed against the backdrop of existing laws such as G.L. c. 151B, and must endeavor to interpret the new statute in harmony with prior enactments to give rise to a consistent

body of law. See Charland v. Muzi Motors, Inc., 417 Mass. 580, 582-83 (1994), and cases cited. In enacting the Medical Marijuana Law, the voters accepted the proponents' argument that "[s]cientific research has proven that marijuana can be useful for many clinical applications, including pain relief, nausea, and seizures." Information for Voters: 2012 Ballot Questions, Question 3: Law Proposed by Initiative Petition, Medical Use of Marijuana. The law was designed precisely for people, like the Plaintiff, for whom other therapies did not provide relief, and was intended to reduce reliance on narcotics. See id. ("[A]llowing the medical use of marijuana will lessen the need for dangerous narcotics like morphine and OxyContin."). Those opioids and similar drugs currently constitute a public health crisis in the Commonwealth but, when used according to law for a qualifying handicap, even the use of such drugs is subject to accommodation under G.L. c. 151B. See Dahill v. Police Dep't of Boston, 434 Mass. 233, 240 n.10 (2001) (noting that accommodations may be required for handicapped individuals to take medication or receive other treatment). See generally Department of Pub. Health, DPH Responds to Opioid

Epidemic, available at http://www.mass.gov/eohhs/gov/departments/dph/programs/substance-abuse/dph-responds-to-opioid-epidemic.html (last visited March 5, 2017) ("Like so many states across the country, Massachusetts is facing a growing epidemic of opioid addiction and overdose deaths."). If off-site medical marijuana use alleviates a qualified patient's symptoms and permits him or her to meet all essential requirements of a position, an employer should have to demonstrate why allowing such use would be an undue hardship.[4] For purposes of G.L.

[4] Contrary to the assertions of the amicus brief of the NFIB Small Business Legal Center (at 7-9, 12-16), allowing medical marijuana use outside of work may be a reasonable accommodation for an employee's disability without jeopardizing workplace safety or accountability. Rather than a categorical rule, an individualized assessment of the effect of such use on the employee and the nature of the job is necessary to determine whether accommodating off-site use would cause an undue hardship, just like any other proposed accommodation. In fact, if employers genuinely care about safety in safety-sensitive positions, they should care about employee impairment on the job regardless of the reason, which workplace drug-testing fails to detect since it only reveals by-products of past drug use. See David Lauriski, The Advantages of Impairment Testing Over Drug Testing to Improve Workplace Safety (February 6, 2017), available at http://predictivesafety.com/news/2017/2/6/the-advantages-of-impairment-testing-over-drug-testing-to-improve-workplace-safety (last visited March 5, 2017) ("Impairment testing is far more valuable as a workplace safety tool than drug testing because it has the ability to screen out impairment regardless of the

c. 151B, a request to accommodate off-site use of medical marijuana should be treated no differently than any other potential accommodation that is consistent with state law.[5]

Consider, for comparison, how G.L. c. 151B would apply to an employee who tested positive on a drug

---

cause, including fatigue, which is a far more common factor in workplace accidents than drug use, and including medications and illicit drugs that can cause impairment, like drowsiness, but that are not included in typical employment drug screens, like over-the-counter medicines and 'designer' or `club' drugs....") And Lauriski notes that "impairment tests now come in the form of easily-accessed software downloaded onto mobile devices like smartphones or tablet computers, which are ubiquitous and more easily affordable and obtainable." Id.

[5] This brief does not address issues of federal preemption, as Defendants have waived any reliance on that issue. See Appellees' Brief at 44 n.33 ("Defendants-Appellees are not arguing federal preemption in this matter.") In the absence of reasoned appellate argument, see Mass. R.A.P. 16(a)(4) and full briefing on the subject, this Court should decide this case solely on the basis of state law. Briefly, however, requiring an employer to accommodate off-site marijuana use would not mandate that it do anything prohibited by federal law. All that Plaintiff seeks is accommodation so that she can engage in medical treatment away from the workplace, on her own time. This conflicts with neither federal prohibitions on possessing or distributing marijuana, nor drug-free workplace policies. In addition, federal law currently prohibits use of government funds to enforce federal drug laws against those in compliance with state medical marijuana laws including that of this Commonwealth, expressing congressional intent that programs like the Medical Marijuana Law not be disturbed. See Consolidated Appropriations Act, 2016, P.L. 114-113, § 542.

screen based on her use of medically and legally authorized opioids, but was refused accommodation. An employee like the Plaintiff, who suffers from the "debilitating medical condition" of Crohn's Disease, would be considered handicapped. Cf. Tompson v. Department of Mental Health, 76 Mass. App. Ct. 586, 588-89, 593 (2010) (expressing "no doubt" that employee suffering from Crohn's Disease qualified as handicapped). On the present record of a Motion to Dismiss, the allegation that she would be capable of performing the essential functions of her position if the requirement of a drug test were waived or relaxed would be taken as true, making her a qualified handicapped person. See Curtis v. Herb Chambers I-95, Inc., 558 Mass. 674, 676 (2011) ("We accept as true the allegations in the complaint and draw every reasonable inference in favor of the plaintiff."). The employer would then bear the burden of demonstrating an undue hardship from tolerating use of doctor-recommended medication outside of the workplace by an employee capable of performing the essential functions of the job with that accommodation. See G.L. c. 151B, § 4(16) (requiring employer to "demonstrate that the accommodation required to be

made . . . would impose an undue hardship to the employer's business"); 804 Code Mass. Regs. § 3.01(5)(c) ("[a]n accommodation is 'reasonable' if it does not impose undue hardship on the employer"). In most cases, the question of undue hardship would be fact-specific and not easily resolved in the employer's favor on a motion to dismiss. See Andover Hous. Auth. v. Shkolnik, 443 Mass. 300, 307 (2005) ("The determination whether a requested accommodation is reasonable is fact specific and will be resolved on a case-by-case basis.")

Before the Medical Marijuana Law was passed, the present case would also have turned on a question of undue hardship. The framework laid out in the previous paragraph would still apply. The Plaintiff would still have been a qualified handicapped person requesting that the employer adjust its drug-testing policy to accommodate off-duty drug use. Why might the employer have been permitted to deny an accommodation? The third factor identified in the statute – "the nature . . . of the accommodation needed" – would most likely have governed.[6] G.L. c.

[6] At first blush, it might also appear that an employer could rely on the definition of "handicap," which

151B, § 4(16). In this counterfactual scenario, the employee would have been asking the Commonwealth, through the MCAD and/or the courts, to compel the employer to enable a practice that would have been unlawful under the statutes of the Commonwealth. See G.L. c. 94C, §§ 32L, 34. The nature of this requested accommodation would have been, at best, in tension with the Commonwealth's public policy as embodied in the Controlled Substances Act. Accordingly, the employer might not have been required to make such an accommodation. Cf. Peabody Properties, Inc. v. Sherman, 418 Mass. 603, 605-08 (1994) (under federal

---

explicitly excludes "current, illegal use of a controlled substance as defined in section one of chapter ninety-four C." G.L. c. 151B, § 1(17). However, in this hypothetical, the employee is not claiming that her handicap is, or results from, illegal drug use. Rather, she is seeking accommodations relating to treatment for a separate medical condition that indisputably qualifies as a handicap. The Massachusetts Commission Against Discrimination has interpreted this exclusion to refer to recreational drug use. See MCAD Persons with Disabilities in the Workplace Guidelines § X.C.1, available at http://www.mass.gov/mcad/resources/employers-businesses/emp-guidelines-handicap-gen.html (last visited March 3, 2017) ("The term handicap does not apply to individuals using drugs recreationally . . . .") These MCAD Guidelines are "entitled to substantial deference." Dahill v. Police Dep't of Boston, 434 Mass. 233, 239 (2001). In any case, under the Medical Marijuana Law, the use of marijuana by qualified patients is no longer "illegal" and therefore falls outside this exclusion.

Fair Housing Act, permitting possession of marijuana with intent to distribute not considered reasonable accommodation for handicapped tenant).

However, because the passage of the Medical Marijuana Law altered the public policy of the Commonwealth and removed applicable criminal and civil penalties, the nature of the requested accommodation no longer dominates the inquiry in the same way. Whether the accommodation would cause an undue hardship, and is therefore unreasonable, becomes a more complex question. In this case, in the context of a motion to dismiss, we must assume as true that the Plaintiff was not impaired by marijuana use on the job, and that she would have performed the requirements of her position.[7] See Curtis v. Herb

[7] The Defendants' assertion that Plaintiff was not a "qualified handicapped individual" because they disapprove of marijuana use and were unwilling to consider the accommodations requested (Appellees' Brief at 40-45) is misguided. Despite their repeated suggestions that the requested accommodations were "facially unreasonable," nowhere do the Defendants make a cogent argument that those accommodations would create an undue hardship within the meaning of G.L. c. 151B, § 4(16). Under Chapter 151B, an accommodation is only unreasonable if it creates an undue hardship; there is no such category as "facially unreasonable." See Andover Hous. Auth. v. Shkolnik, 443 Mass. 300, 307 (2005); 804 Code Mass. Regs. § 3.01(5)(c) ("[a]n accommodation is 'reasonable' if it does not impose undue hardship on the employer"). Moreover, it is

Chambers I-95, Inc., 458 Mass. at 676. To be clear, the Plaintiff has not claimed that marijuana use is a "handicap;" rather, she seeks an accommodation to allow her to receive effective and state-authorized treatment for her handicap of Crohn's Disease, which Defendants rejected out of hand. The employer has not identified specific safety regulations or federal requirements, which would change the calculus for the employer; given the nature of the position, they probably are not relevant to the present case. Compare Everett v. The 357 Corp., 453 Mass 585, 606 (2009) (lack of federal Department of Transportation certificate permitted employer to discharge truck driver with psychiatric disabilities). Indeed, because the employer refused to participate in an interactive process as the law demands and simply rejected any accommodation, the time to identify such concerns is long since past. Therefore, the employer should have to demonstrate on an individualized basis

---

irrelevant whether Plaintiff could use treatments other than marijuana for her medical condition because the existence of a handicap depends only on the impairment and not on mitigating measures like medication or other treatment. See Dahill v. Police Dep't of Boston, 434 Mass. 233, 239-41 (2001).

that accommodating off-site, off-duty medical marijuana use would create an undue hardship.

b. Excluding Medical Marijuana Patients from the Scope of c. 151B Would Penalize Them or Deny Them Existing Rights and Privileges, Contrary to the Medical Marijuana Law.

Treating a qualified handicapped person using medical marijuana differently than a disabled person using other medication would "penalize" them or deny them the "right or privilege" of reasonable accommodation for handicaps, contrary to St. 2012, c. 369, § 4. An employee who is prescribed OxyContin and terminated based on a zero-tolerance policy for opiates may seek relief from the Massachusetts Commission Against Discrimination or the Superior Court pursuant to G.L. c. 151B, §§ 5, 9. Cf. Flagg, 466 Mass. at 27 (discrimination based on cost of medical treatment); id. at 40-41 (Gants, J., concurring); Wooster v. Abdow Corp., 46 Mass. App. Ct. 665, 667-71 (1999) (same). Such adverse employment action would constitute handicap discrimination based, at a minimum, on a failure to make reasonable accommodations for those with handicaps. Cf. Dahill v. Police Dep't of Boston, 434 Mass. 233, 240-418 n.10. But if handicapped people using medical

marijuana are categorically excluded from the laws concerning disability discrimination, as the Superior Court held here, they would be denied their statutory (G.L. c. 151B and G.L. c. 93, § 103) and constitutional (art. 114) rights to be free from discrimination based on their handicaps. Cf. Carleton v. Commonwealth, 447 Mass 791, 810 n. 29 (2006) (noting "strong presumption . . . against categorical exclusions from employment based on handicap"). Because they consumed marijuana as authorized by statute (and as recommended by their physicians), these individuals would be stripped of any protection against discriminatory practices considered unfair for other handicapped individuals, a substantial penalty contrary to the voters' intent in the Medical Marijuana Law that qualified patients "shall not be penalized under Massachusetts law in any manner." St. 2012, c. 369, § 4 (emphasis supplied).

At least one court from another state interpreting nearly identical language has read it in this manner. The Michigan Court of Appeals persuasively held that an employee should not be penalized by denying unemployment benefits based on medical use of marijuana. See Braska v. Challenge

Mfg. Co., 307 Mich. App. 340, 357-59 (2014). The claimants in Braska were each discharged for failing a drug test due to use of medical marijuana consistent with Michigan's cognate statute. See id. at 343-44, 346-47, 349. Normally, this basis for termination would have disqualified the claimants from receiving unemployment benefits. See id. at 353, citing Mich. Comp. Laws § 421.29(1)(m). However, the Michigan medical marijuana statute, in language very similar to that of the Medical Marijuana Law, provides that a qualifying patient "shall not be subject to . . . penalty in any manner, or denied any right or privilege . . . for the medical use of marihuana in accordance with this act." Id. at 357, quoting from Mich. Comp. Laws § 333.26424(a) (emphasis deleted). The court held that this language created a "broad" immunity from punishment for protected conduct. See id. at 358; cf. Ter Beek v. Wyoming, 495 Mich. 1, 20-21 (2014) (zoning ordinance prohibiting marijuana use, enforceable by injunction or civil penalty, preempted due to this immunity). The court noted that "because claimants used medical marijuana, they were required to forfeit their unemployment benefits," and held that this forfeiture constituted a prohibited penalty.

Braska, supra at 359-60. Accordingly, the claimants were awarded benefits, even though this resulted in increased costs to the employers. See id. at 361. Similarly, Massachusetts patients who require marijuana to treat their medical conditions should retain their constitutional and statutory rights to be free from discrimination. Denying qualifying patients these rights and privileges by excluding them from the scope of G.L. c. 151B would be contrary to the Medical Marijuana Law. See St. 2012, c. 369, § 4.

Although courts from other jurisdictions have dismissed causes of action for failure to accommodate medical marijuana use, the claims brought and/or statutes construed in those cases are materially different from those at bar. The statutes in California and Washington, for example, are focused exclusively on immunity from criminal prosecution, and the California statute did not contain language – included in the Massachusetts law – which precludes qualifying patients from being "penalized in any manner" or from being "denied any right or privilege." See Ross v. RagingWire Telecomm'ns., Inc., 174 P.3d 200, 204 (Cal. 2008) ("California's voters merely exempted medical users and their primary caregivers

from criminal liability under two specifically designated state statutes"); Roe v. TeleTech Customer Care Mgmt. (Colo.) LLC, 171 Wash. 2d 736, 745-48 (2011) (holding that Washington statute, which referred to "any right or privilege" only in context of affirmative defense to criminal prosecution, was solely focused on removing criminal penalties). The plaintiff in the Washington case also did not assert a claim for disability discrimination. See Roe, 171 Wash. 2d at 744.

The decision of the Oregon Supreme Court concerning its statute was fundamentally based on federal preemption, which has not been raised here.[8] See Emerald Steel Fabricators, Inc. v. Bureau of Labor and Indus., 348 Or. 159, 170-78 (2010) (holding that provision of anti-discrimination law that could have authorized accommodations for medical marijuana was preempted by federal Controlled Substances Act). Meanwhile, the Colorado Supreme Court considered a statute protecting "lawful activities" off duty, not disabled individuals seeking accommodations, and held

[8] In any event, federal preemption should not preclude the limited class of accommodations intended to permit off-site use of marijuana unless there is a specific federal law or regulation rendering such off-site accommodations impermissible. See supra note 5.

only that marijuana use violated federal law and was therefore not "lawful." See Coats v. Dish Network, LLC, 350 P.3d 849, 852-53 (Colo. 2015).

The federal courts addressing the Michigan medical marijuana statute, which is similarly worded, did not have the benefit of the state courts' expansive interpretations of its immunities and did not address a claim under Michigan's cognates to G.L. c. 151B. See Casias v. Wal-Mart Stores, Inc., 695 F.3d 428, 435-37 (6th Cir. 2012) (noting but distinguishing two Michigan statutes prohibiting disability discrimination); Casias v. Wal-Mart Stores, Inc., 764 F. Supp. 2d 914, 921, 925 (W.D. Mich. 2011) (stating that only claims under medical marijuana law and for termination in violation of public policy were brought, and distinguishing anti-discrimination laws). Compare Ter Beek v. Wyoming, 495 Mich. 1, 20-21 (2014) (holding that medical marijuana law provided broad immunity against any punishment or forfeiture as result of qualifying use); Braska v. Challenge Mfg. Co., 307 Mich. App. 340, 358-60 (2014) (applying term "penalty" as broadly as possible and permitting qualifying patients to receive unemployment benefits). Amici have found no state or federal appellate case

applying an identically or similarly worded medical marijuana statute to the range of claims raised here. These out-of-state cases therefore carry limited persuasive value.

Permitting accommodations for qualifying medical marijuana patients is consistent with the policy mandates enacted by the voters. In the criminal context, this Court made substantial adjustments to existing jurisprudence concerning marijuana after the 2008 initiative making possession of less than an ounce of marijuana a civil infraction. Before that initiative passed, the odor of marijuana was sufficient to justify a warrantless search. See Commonwealth v. Garden, 451 Mass. 43, 47-48 (2008). Following the initiative's passage, this Court relied upon "the intent of the voters to change the societal impact of possessing one ounce or less of marijuana" in determining that marijuana odor no longer gave rise to suspicion of a criminal offense. See Commonwealth v. Cruz, 459 Mass. 459, 469-70, 472 (2011). This Court also focused on the intent of the voters and the policy goals of the initiative when it held that social sharing of small amounts of marijuana could not be considered "distribution" that was still subject to

criminal penalties. See Commonwealth v. Jackson, 464 Mass. 758, 762 n.3, 765-66 (2013). And it again effectuated the will of the voters when it rejected an argument that federal law gave police authority to search based on the smell of marijuana, instead holding that the initiative had implicitly curtailed the authority of state and local police. See Commonwealth v. Craan, 469 Mass. 24, 32-34 (2014) ("We will not adopt an interpretation that is so plainly at odds with the purpose of the initiative.").

This Court should adopt a similar approach to the off-site use of medical marijuana by employees, interpreting existing legal protections broadly in order to effectuate the policies adopted by the voters. Under G.L. c. 151B, employers had and have an obligation to make reasonable accommodations for individuals with disabilities. See Ocean Spray Cranberries, Inc. v. Massachusetts Comm'n Against Discrimination, 441 Mass. at 644 ("The refusal of an employer . . . to make a reasonable accommodation once it has been identified[] is a violation of our discrimination laws."). An exception to a policy such as drug testing is a type of accommodation that is reasonable under some circumstances. See Brown v.

F.L. Roberts & Co., Inc., 452 Mass. 674, 682-83 (2008) (refusing to consider exemption to grooming policy "undue hardship as a matter of law" and, holding that, in absence of interactive process, employer must "conclusively demonstrate that all conceivable accommodations would impose an undue hardship on the course of its business" [quoting from Massachusetts Bay Transp. Auth. v. Massachusetts Comm'n Against Discrimination, 450 Mass. 327, 342 (2008); emphasis in original]); MCAD Persons with Disabilities in the Workplace Guidelines, § II.C (defining "reasonable accommodation" to include "modification to . . . [an] employment practice" such as "modification of tests"). Although the penalties for marijuana use before the Medical Marijuana Law may have precluded requiring accommodations for medical marijuana use, the voters removed those impediments. In order to give full effect to the will of the people as expressed through the initiative process, this Court should apply the usual standards for judging a proposed accommodation, hold that the Plaintiff has pleaded sufficient facts to survive a motion to dismiss, and reverse the judgment of the Superior Court.

II. The Medical Marijuana Law Permits a Private Right of Action Against Employers Who Discriminate Against Handicapped Individuals Using Medical Marijuana Off-Site Based on Art. 114 of the Massachusetts Constitution, Statutes Such as G.L. c. 151B and the Massachusetts Equal Rights Act (MERA), and the Public Policy Underlying These Enactments.

By explicitly preserving the "rights [and] privileges" of qualifying patients, the Medical Marijuana Law contemplates and embraces existing causes of action protecting against workplace disability discrimination, permitting medical marijuana users to seek relief through channels such as G.L. c. 151B, MERA, and art. 114.[9] The Medical Marijuana Law must be read together with existing statutes in order to form a harmonious whole and provide redress for violations of the Commonwealth's dominant policy against discrimination. See Charland v. Muzi Motors, Inc., 417 Mass. 580, 582-83 (1994), and cases cited; Massachusetts Bay Transp. Auth. v. Boston Carmen's Union, Local 589, 454 Mass. 19, 26 (2009). Accordingly, the statute should be interpreted to permit existing causes of action to

[9] Accordingly, the Court need not reach the issue of whether the Medical Marijuana Law and implementing regulations create an independent cause of action when other statutory avenues of relief are unavailable.

enforce the rights set forth in the Medical Marijuana Law.

The Commonwealth's interest in preventing handicap discrimination goes beyond the limitations and remedies of G.L. c. 151B. In 1980, the people ratified art. 114, a constitutional amendment that provides: "No otherwise qualified handicapped individual shall, solely by reason of his handicap, be excluded from the participation in, denied the benefits of, or be subject to discrimination under any program or activity within the commonwealth." As courts have noted, art. 114 is broadly worded and "has no express state action limitation." Grubba v. Bay State Abrasives, Div. of Dresser Indus., Inc., 803 F.2d 746, 747-748 (1st Cir. 1986). In addition to adding handicapped individuals to the classes protected under G.L. c. 151B, the Legislature later enacted MERA to further safeguard these critical rights. See Shedlock v. Department of Correction, 442 Mass. 844, 852 n.6 (2004) ("Actions to enforce the rights guaranteed by art. 114 of the Amendments to the Massachusetts Constitution are authorized by G. L. c. 93, § 103."). However, if a violation of art. 114 falls outside the scope of existing statutory

mechanisms for relief, a private cause of action exists directly under art. 114 to vindicate the constitutional right to be free from disability discrimination. See Layne v. Superintendent, Mass. Correctional Inst., Cedar Junction, 406 Mass. 156, 159-60 (1989).

If an employer discriminates against a "qualified handicapped individual" based on his or her handicap, by refusing to consider an accommodation permitted under the Medical Marijuana Law, the employer has violated art. 114, for which violation there must be a remedy. The employer's action would exclude the employee from participation in an activity (employment) within the Commonwealth because of the employee's handicap. The intrinsic link between the handicap and the medical treatment to mitigate or alleviate the symptoms of the handicap cannot be ignored. Cf. Flagg v. AliMed, Inc., 466 Mass. 23, 37 (2013) (treating adverse action based on medical costs necessary for treatment as handicap discrimination under G.L. c. 151B); Wooster v. Abdow Corp., 46 Mass. App. Ct. 665, 667-71 (1999) (same). This constitutional injury is cognizable under G.L. c. 151B, or when that statute is unavailable (for

instance, for employers with fewer than six employees), under statutes such as MERA. See Carleton v. Commonwealth, 447 Mass. 791, 813 n.37 (2006), citing O'Connell v. Chasdi, 400 Mass. 686, 693 & n.9 (1987). The proper remedy in different situations might be considered as a constitutional action under art. 114, a claim under G.L. c. 151B or MERA, or a common-law suit for wrongful termination based on the public policy of art. 114 and the Medical Marijuana Law. Whatever the label, an action for suitable relief should lie against an employer who discriminates against an employee by denying a reasonable accommodation related to medical marijuana. Since some avenue of relief should be made available to the Plaintiff, the order on the Defendants' motion to dismiss should be reversed. See Whitinsville Plaza, Inc. v. Kotseas, 378 Mass. 85, 89 (1979) ("[A] complaint is not subject to dismissal if it would support relief on any theory of law" [emphasis in original]).

CONCLUSION

For the foregoing reasons, Amici urge this Honorable Court to reverse the judgment of the Superior Court, hold that a claim for failure to accommodate off-site use of medical marijuana is cognizable under G.L. c. 151B and otherwise, and remand for further proceedings.

Respectfully Submitted for
MASSACHUSETTS EMPLOYMENT LAWYERS ASSOCIATION, AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS, GLBTQ LEGAL ADVOCATES & DEFENDERS, MENTAL HEALTH LEGAL ADVISORS COMMITTEE, AND UNION OF MINORITY NEIGHBORHOODS
By their attorneys,

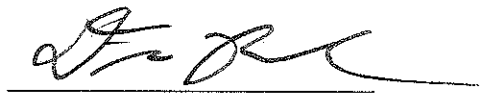
David A. Russcol (BBO #670768)
Zalkind Duncan & Bernstein LLP
65A Atlantic Avenue
Boston, MA 02110
(617) 742-6020
drusscol@zalkindlaw.com

Chetan Tiwari (BBO #692912)
Mental Health Legal Advisors Committee
24 School Street, Suite 804
Boston, MA 02108
617-338-2345 x 132
ctiwari@mhlac.org

March 7, 2017

CERTIFICATE OF COMPLIANCE

I, David A. Russcol, hereby certify that I have complied with all relevant provisions of Massachusetts Rules of Appellate Procedure 16, 17, 19, and 20 with respect to the contents, format, filing, and service of the within brief.



David A. Russcol

ADDENDUM

INDEX OF THE ADDENDUM

Part I ADMINISTRATION OF THE GOVERNMENT

Title XXI LABOR AND INDUSTRIES

Chapter 151B UNLAWFUL DISCRIMINATION BECAUSE OF RACE, COLOR, RELIGIOUS CREED, NATIONAL ORIGIN, ANCESTRY OR SEX

Section 1 DEFINITIONS

Section 1. As used in this chapter

1. The term "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, receivers, and the commonwealth and all political subdivisions, boards, and commissions thereof.

2. The term "employment agency" includes any person undertaking to procure employees or opportunities to work.

3. The term "labor organization" includes any organization which exists and is constituted for the purpose, in whole or in part, of collective bargaining or of dealing with employers concerning grievances, terms or conditions of employment, or of other mutual aid or protection in connection with employment.

4. The term "unlawful practice" includes only those unlawful practices specified in section four.

5. The term "employer" does not include a club exclusively social, or a fraternal association or corporation, if such club, association or corporation is not organized for private profit, nor does it include any employer with fewer than six persons in his employ, but shall include an employer of domestic workers including those covered under section 190 of chapter 149, the commonwealth and all political subdivisions, boards, departments and commissions thereof. Notwithstanding the provisions of any general or special law nothing herein shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, and which limits membership, enrollment, admission, or participation to members of that religion, from giving preference in hiring or employment to members of the same religion or from taking any action with respect to matters of employment, discipline, faith, internal organization, or ecclesiastical rule, custom, or law which are calculated by such organization to promote the religious principles for which it is established or maintained.

6. The term "employee" does not include any individual employed by his parents, spouse or child.

7. The term "commission", unless a different meaning clearly appears from the context, means the Massachusetts commission against discrimination, established by section fifty-six of chapter six.

8. The term "age" unless a different meaning clearly appears from the context, includes any duration of time since an individual's birth of greater than forty years.

9. The term "housing or housing accommodations" includes any building, structure or portion thereof which is used or occupied or is intended, arranged or designed to be used or occupied, as the home, residence or sleeping place of one or more human beings.

10. The term "publicly assisted housing accommodations" includes all housing accommodations in

(a) housing constructed after July first, nineteen hundred and fifty, and

(1) which is exempt in whole or in part from taxes levied by the commonwealth or any of its political subdivisions;

(2) which is constructed on land sold below cost by the commonwealth or any of its political subdivisions or any agency thereof, pursuant to the federal housing act of nineteen hundred and forty-nine;

(3) which is constructed in whole or in part on property acquired or assembled by the commonwealth or any of its political subdivisions or any agency thereof through the power of condemnation or otherwise for the purpose of such construction; or

(4) for the acquisition, construction, repair or maintenance of which the commonwealth or any of its political subdivisions or any agency thereof supplies funds or other financial assistance;

(b) housing which is located in a multiple dwelling, the acquisition, construction, rehabilitation, repair or maintenance of which is, after October first, nineteen hundred and fifty-seven, financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the federal government or any agency thereof; provided, that such a housing accommodation shall be deemed to be publicly assisted only during the life of such loan and such guaranty or insurance; and

(c) housing which is offered for sale, lease or rental by a person who owns or otherwise controls the sale of the same, and which is part of a parcel of ten or more housing accommodations located on land that is contiguous, exclusive of public streets, if (1) the acquisition, construction, rehabilitation, repair or maintenance of such housing accommodations is after October first, nineteen hundred and fifty-seven, financed in whole or in part by a loan whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the federal government or any agency thereof; provided, that such a housing accommodation shall be deemed to be publicly assisted only during the life of such loan and guaranty or insurance; or (2) a commitment issued by a government agency after October first, nineteen hundred and fifty-seven, is outstanding that acquisition of such housing accommodations may be financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the federal government or any agency thereof.

11. The term "multiple dwelling" means a dwelling which is usually occupied for permanent residence purposes and which is either rented, leased, let or hired out, to be occupied as the residence or home of three or more families living independently of each other. A "multiple dwelling" shall not be deemed to include a hospital, convent, monastery, asylum or public institution, or a fireproof building used wholly for commercial purposes except for not more than one janitor's apartment and not more than one penthouse occupied by not more than two families. The term "family", as used herein, means (a) a person occupying a dwelling and maintaining a household either alone or with not more than four boarders, roomers or lodgers; or (b) two or more persons occupying a dwelling, either living together and maintaining a common household, or living together and maintaining a common household with not more than four boarders, roomers or lodgers. A "boarder", "roomer" or "lodger" residing with a family means a person living within the household who pays a consideration for such residence and does not occupy such space within the household as an incident of employment therein.

12. The term "contiguously located housing" means (1) housing which is offered for sale, lease or rental by a person who owns or at any time has owned, or who otherwise controls or at any time has controlled, the sale of ten or more housing accommodations located on land that is contiguous (exclusive of public streets), and which housing is located on such land, or (2) housing which is offered for sale, lease or rental and which at any time was one of ten or more lots of a tract whose plan has been submitted to a planning board as required by THE SUBDIVISION CONTROL LAW, as appearing in sections eighty-one K to eighty-one GG, inclusive, of chapter forty-one.

13. The term "other covered housing accommodations" includes all housing accommodations not specifically covered under subsections 10, 11 and 12 which are directly or through an agent made generally available to the public for sale or lease or rental, by advertising in a newspaper or otherwise, by posting of a sign or signs or a notice or notices on the premises or elsewhere, by listing with a broker, or by any other means of public offering.

14. The term "commercial space" means any space in a building, structure, or portion thereof which is used or occupied or is intended, arranged or designed to be used or occupied for the manufacture, sale, resale, processing, reprocessing, displaying, storing, handling, garaging or distribution of personal property; and any space which is used or occupied, or is intended, arranged or designed to be used or occupied as a separate business or professional unit or office in any building, structure or portion thereof.

15. The term "housing development" means multi-apartment units operated as contiguously located housing accommodations.

16. The term "qualified handicapped person" means a handicapped person who is capable of performing the essential functions of a particular job, or who would be capable of performing the essential functions of a particular job with reasonable accommodation to his handicap.

17. The term "handicap" means (a) a physical or mental impairment which substantially limits one or more major life activities of a person; (b) a record of having such impairment; or (c) being regarded as having such impairment, but such term shall not include current, illegal use of a controlled substance as defined in section one of chapter ninety-four C.

18. The term "sexual harassment" shall mean sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when (a) submission to or rejection of such advances, requests or conduct is made either explicitly or implicitly a term or condition of employment or as a basis for employment decisions; (b) such advances, requests or conduct have the purpose or effect of unreasonably interfering with an individual's work performance by creating an intimidating, hostile, humiliating or sexually offensive work environment. Discrimination on the basis of sex shall include, but not be limited to, sexual harassment.

19. The term "handicapped person" means any person who has a handicap.

20. The term "major life activities" means functions, including, but not limited to, caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.

21. The term "accessible" means that housing is functional for and can be safely and independently used by a physically or mentally handicapped person and complies with rules or regulations established by the commission.

22. The term "genetic information", shall mean any written, recorded individually identifiable result of a genetic test as defined by this section or explanation of such a result or family history pertaining to the presence, absence, variation, alteration, or modification of a human gene or genes. For the purposes of this chapter, the term genetic information shall not include information pertaining to the abuse of drugs or alcohol which is derived from tests given for the exclusive purpose of determining the abuse of drugs or alcohol.

23. The term "genetic test", shall mean any tests of human DNA, RNA, mitochondrial DNA, chromosomes or proteins for the purpose of identifying genes or genetic abnormalities, or the presence or absence of inherited or acquired characteristics in genetic material. For the purposes of this chapter, the term genetic test shall not include tests given for the exclusive purpose of determining the abuse of drugs or alcohol.

Section 4. It shall be an unlawful practice:

[Subsection 1 effective until July 14, 2016. For text effective July 14, 2016, see below.]

1. For an employer, by himself or his agent, because of the race, color, religious creed, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, genetic information, or ancestry of any individual to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment, unless based upon a bona fide occupational qualification.

[Subsection 1 as amended by 2016, 141, Sec. 22 effective July 14, 2016. For text effective until July 14, 2016, see above.]

1. For an employer, by himself or his agent, because of the race, color, religious creed, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, genetic information, ancestry or status as a veteran of any individual to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment, unless based upon a bona fide occupational qualification.

1A. It shall be unlawful discriminatory practice for an employer to impose upon an individual as a condition of obtaining or retaining employment any terms or conditions, compliance with which would require such individual to violate, or forego the practice of, his creed or religion as required by that creed or religion including but not limited to the observance of any particular day or days or any portion thereof as a sabbath or holy day and the employer shall make reasonable accommodation to the religious needs of such individual. No individual who has given notice as hereinafter provided shall be required to remain at his place of employment during any day or days or portion thereof that, as a requirement of his religion, he observes as his sabbath or other holy day, including a reasonable time prior and subsequent thereto for travel between his place of employment and his home, provided, however, that any employee intending to be absent from work when so required by his or her creed or religion shall notify his or her employer not less than ten days in advance of each absence, and that any such absence from work shall, wherever practicable in the judgment of the employer, be made up by an equivalent amount of time at some other mutually convenient time. Nothing under this subsection shall be deemed to require an employer to compensate an employee for such absence. "Reasonable Accommodation", as used in this subsection shall mean such accommodation to an employee's or prospective

employee's religious observance or practice as shall not cause undue hardship in the conduct of the employer's business. The employee shall have the burden of proof as to the required practice of his creed or religion. As used in this subsection, the words "creed or religion" mean any sincerely held religious beliefs, without regard to whether such beliefs are approved, espoused, prescribed or required by an established church or other religious institution or organization.

Undue hardship, as used herein, shall include the inability of an employer to provide services which are required by and in compliance with all federal and state laws, including regulations or tariffs promulgated or required by any regulatory agency having jurisdiction over such services or where the health or safety of the public would be unduly compromised by the absence of such employee or employees, or where the employee's presence is indispensable to the orderly transaction of business and his or her work cannot be performed by another employee of substantially similar qualifications during the period of absence, or where the employee's presence is needed to alleviate an emergency situation. The employer shall have the burden of proof to show undue hardship.

1B. For an employer in the private sector, by himself or his agent, because of the age of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual, or to discriminate against such individual in compensation or in terms, conditions or privileges of employment, unless based upon a bona fide occupational qualification.

1C. For the commonwealth or any of its political subdivisions, by itself or its agent, because of the age of any individual, to refuse to hire or employ or to bar or discharge from employment such individual in compensation or in terms, conditions or privileges of employment unless pursuant to any other general or special law.

1D. For an employer, an employment agency, the commonwealth or any of its political subdivisions, by itself or its agents, to deny initial employment, reemployment, retention in employment, promotion or any benefit of employment to a person who is a member of, applies to perform, or has an obligation to perform, service in a uniformed military service of the United States, including the National Guard, on the basis of that membership, application or obligation.

[Subsection 2 effective until July 14, 2016. For text effective July 14, 2016, see below.]

2. For a labor organization, because of the race, color, religious creed, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information, or ancestry of any individual, or because of the handicap of any person alleging to be a qualified handicapped person, to exclude from full membership rights or to expel from its membership such individual or to discriminate in any way against any of its members or against any employer or any individual employed by an employer unless based upon a bona fide occupational qualification.

[Subsection 2 as amended by 2016, 141, Sec. 22 effective July 14, 2016. For text effective until July 14, 2016, see above.]

2. For a labor organization, because of the race, color, religious creed, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information, ancestry or status as a veteran of any individual, or because of the handicap of any person alleging to be a qualified handicapped person, to exclude from full membership rights or to expel from its membership such individual or to discriminate in any way against any of its members or against any employer or any individual employed by an employer unless based upon a bona fide occupational qualification.

[Subsection 3 effective until July 14, 2016. For text effective July 14, 2016, see below.]

3. For any employer or employment agency to print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment or to make any inquiry or record in connection with employment, which expresses, directly or indirectly, any limitation, specification or discrimination as to the race, color, religious creed, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information or ancestry, or the handicap of a qualified handicapped person or any intent to make any such limitation, specification or discrimination, or to discriminate in any way on the ground of race, color, religious creed, national origin, sex, gender identity, sexual orientation, age, genetic information, ancestry or the handicap of a qualified handicapped person, unless based upon a bona fide occupational qualification.

[Subsection 3 as amended by 2016, 141, Secs. 23 and 24 effective July 14, 2016. For text effective until July 14, 2016, see above.]

3. For any employer or employment agency to print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment or to make any inquiry or record in connection with employment, which expresses, directly or indirectly, any limitation, specification or discrimination as to the race, color, religious creed, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information, ancestry or status as a veteran, or the handicap of a qualified handicapped person or any intent to make any such limitation, specification or discrimination, or to discriminate in any way on the ground of race, color, religious creed, national origin, sex, gender identity, sexual orientation, age, genetic information, ancestry, status as a veteran or the handicap of a qualified handicapped person, unless based upon a bona fide occupational qualification.

3A. For any person engaged in the insurance or bonding business, or his agent, to make any inquiry or record of any person seeking a bond or surety bond conditioned upon faithful performance of his duties or to use any form of application in connection with the furnishing of such bond, which seeks information relative to the race, color, religious creed, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, genetic information, or ancestry of the person to be bonded.

3B. For any person whose business includes granting mortgage loans or engaging in residential real estate-related transactions to discriminate against any person in the granting of any mortgage loan or in making available such a transaction, or in the terms or conditions of such a loan or transaction, because of race, color, religion, sex, gender identity, sexual orientation which shall not include persons whose sexual orientation involves minor children as the sex object, children, national origin, genetic information, ancestry, age or handicap. Such transactions shall include, but not be limited to:

(1) the making or purchasing of loans or the provision of other financial assistance for purchasing, constructing, improving, repairing, or maintaining a dwelling; or the making or purchasing of loans or the provision of other financial assistance secured by residential real estate; or

(2) the selling, brokering, or appraising of residential real estate.

In the case of age, the following shall not be an unlawful practice:

(1) an inquiry of age for the purpose of determining a pertinent element of credit worthiness;

(2) the use of an empirically derived credit system which considers age; provided, however, that such system is based on demonstrably and statistically sound data; and provided, further, that such system does not assign a negative factor or score to any applicant who has reached age sixty-two;

(3) the offering of credit life insurance or credit disability insurance, in conjunction with any mortgage loan, to a limited age group;

(4) the failure or refusal to grant any mortgage loan to a person who has not attained the age of majority;

(5) the failure or refusal to grant any mortgage loan the duration of which exceeds the life expectancy of the applicant as determined by the most recent Individual Annuity Mortality Table.

Nothing in this subsection prohibits a person engaged in the business of furnishing appraisals of real property from taking into consideration factors other than those hereinabove proscribed.

3C. For any person to deny another person access to, or membership or participation in, a multiple listing service, real estate brokers' organization, or other service, organization, or facility relating to the business of selling or renting dwellings, or to discriminate against such person in the terms or conditions of such access, membership, or participation, on account of race, color, religion, sex, gender identity, sexual orientation which shall not include persons whose sexual orientation involves minor children as the sex object, children, national origin, genetic information, ancestry, age, or handicap.

4. For any person, employer, labor organization or employment agency to discharge, expel or otherwise discriminate against any person because he has opposed any practices forbidden under this chapter or because he has filed a complaint, testified or assisted in any proceeding under section five.

4A. For any person to coerce, intimidate, threaten, or interfere with another person in the exercise or enjoyment of any right granted or protected by this chapter, or to coerce, intimidate, threaten or interfere with such other person for having aided or encouraged any other person in the exercise or enjoyment of any such right granted or protected by this chapter.

5. For any person, whether an employer or an employee or not, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this chapter or to attempt to do so.

6. For the owner, lessee, sublessee, licensed real estate broker, assignee or managing agent of publicly assisted or multiple dwelling or contiguously located housing accommodations or other person having the right of ownership or possession or right to rent or lease, or sell or negotiate for the sale of such accommodations, or any agent or employee of such a person, or any organization of unit owners in a condominium or housing cooperative: (a) to refuse to rent or lease or sell or negotiate for sale or otherwise to deny to or withhold from any person or group of persons such accommodations because of the race, religious creed, color, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information, ancestry, or marital status of such person or persons or because such person is a veteran or member of the armed forces, or because such person is blind, or hearing impaired or has any other handicap; (b) to discriminate against any person because of his race, religious creed, color, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, ancestry, or marital status or because such person is a veteran or member of the armed forces, or because such person is blind, or hearing impaired or has any other handicap in the terms, conditions or privileges of such accommodations or the acquisitions thereof, or in the furnishings of facilities and services in connection therewith, or because such a person possesses a trained

dog guide as a consequence of blindness, or hearing impairment; (c) to cause to be made any written or oral inquiry or record concerning the race, religious creed, color, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information, ancestry or marital status of the person seeking to rent or lease or buy any such accommodation, or concerning the fact that such person is a veteran or a member of the armed forces or because such person is blind or hearing impaired or has any other handicap. The word "age" as used in this subsection shall not apply to persons who are minors nor to residency in state-aided or federally-aided housing developments for the elderly nor to residency in housing developments assisted under the federal low income housing tax credit and intended for use as housing for persons 55 years of age or over or 62 years of age or over, nor to residency in communities consisting of either a structure or structures constructed expressly for use as housing for persons 55 years of age or over or 62 years of age or over if the housing owner or manager register biennially with the department of housing and community development. For the purpose of this subsection, housing intended for occupancy by persons fifty-five or over and sixty-two or over shall comply with the provisions set forth in 42 USC 3601 et seq.

For purposes of this subsection, discrimination on the basis of handicap includes, but is not limited to, in connection with the design and construction of: (1) all units of a dwelling which has three or more units and an elevator which are constructed for first occupancy after March thirteenth, nineteen hundred and ninety-one; and (2) all ground floor units of other dwellings consisting of three or more units which are constructed for first occupancy after March thirteenth, nineteen hundred and ninety-one, a failure to design and construct such dwellings in such a manner that (i) the public use and common use portions of such dwellings are readily accessible to and usable by handicapped persons; (ii) all the doors are designed to allow passage into and within all premises within such dwellings and are sufficiently wide to allow passage by handicapped persons in wheelchairs; and (iii) all premises within such dwellings contain the following features of adaptive design; (a) an accessible route into and through the dwelling; (b) light switches, electrical outlets, thermostats, and other environmental controls in accessible locations; (c) reinforcements in bathroom walls to allow later installation of grab bars; and (d) usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space.

7. For the owner, lessee, sublessee, real estate broker, assignee or managing agent of other covered housing accommodations or of land intended for the erection of any housing accommodation included under subsection 10, 11, 12, or 13 of section one, or other person having the right of ownership or possession or right to rent or lease or sell, or negotiate for the sale or lease of such land or accommodations, or any agent or employee of such a person or any organization of unit owners in a condominium or housing cooperative: (a) to refuse to rent or lease or sell or negotiate for sale or lease or otherwise to deny or withhold from any person or group of persons such accommodations or land because of race, color, religious creed, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information, ancestry, or marital status, veteran status or membership in the armed forces, blindness, hearing impairment, or because such person possesses a trained dog guide as a consequence of blindness or hearing impairment or other handicap of such person or persons; (b) to discriminate against any person because of his race, color, religious creed, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information, ancestry, or marital status, veteran status or membership in the armed services, blindness, or hearing impairment or other handicap, or because such person possesses a trained dog guide as a consequence

of blindness or hearing impairment in the terms, conditions or privileges of such accommodations or land or the acquisition thereof, or in the furnishing of facilities and services in the connection therewith or (c) to cause to be made any written or oral inquiry or record concerning the race, color, religious creed, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information, ancestry, marital status, veteran status or membership in the armed services, blindness, hearing impairment or other handicap or because such person possesses a trained dog guide as a consequence of blindness or hearing impairment, of the person seeking to rent or lease or buy any such accommodation or land; provided, however, that this subsection shall not apply to the leasing of a single apartment or flat in a two family dwelling, the other occupancy unit of which is occupied by the owner as his residence. The word "age" as used in this subsection shall not apply to persons who are minors nor to residency in state-aided or federally-aided housing developments for the elderly nor to residency in housing developments assisted under the federal low income housing tax credit and intended for use as housing for persons 55 years of age or over or 62 years of age or over, nor to residency in communities consisting of either a structure or structures constructed expressly for use as housing for persons 55 years of age or over or 62 years of age or over if the housing owner or manager register biennially with the department of housing and community development. For the purpose of this subsection, housing intended for occupancy by persons fifty-five or over and sixty-two or over shall comply with the provisions set forth in 42 USC 3601 et seq.

7A. For purposes of subsections 6 and 7 discrimination on the basis of handicap shall include but not be limited to:

(1) a refusal to permit or to make, at the expense of the handicapped person, reasonable modification of existing premises occupied or to be occupied by such person if such modification is necessary to afford such person full enjoyment of such premises; provided, however, that, in the case of publicly assisted housing, multiple dwelling housing consisting of ten or more units, or contiguously located housing consisting of ten or more units, reasonable modification shall be at the expense of the owner or other person having the right of ownership; provided, further, that, in the case of public ownership of such housing units the cost of such reasonable modification shall be subject to appropriation; and provided, further, that, in the case of a rental, the landlord may, where the modification to be paid for by the handicapped person will materially alter the marketability of the housing, condition permission for a modification on the tenant agreeing to restore or pay for the cost of restoring, the interior of the premises to the condition that existed prior to such modification, reasonable wear and tear excepted;

(2) a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford a handicapped person equal opportunity to use and enjoy a dwelling; and

(3) discrimination against or a refusal to rent to a person because of such person's need for reasonable modification or accommodation.

Reasonable modification shall include, but not be limited to, making the housing accessible to mobility-impaired, hearing-impaired and sight-impaired persons including installing raised numbers which may be read by a sight-impaired person, installing a door bell which flashes a light for a hearing-impaired person, lowering a cabinet, ramping a front entrance of five or fewer vertical steps, widening a doorway, and installing a grab bar;

provided, however, that for purposes of this subsection, the owner or other person having the right of ownership shall not be required to pay for ramping a front entrance of more than five steps or for installing a wheelchair lift.

Notwithstanding any other provisions of this subsection, an accommodation or modification which is paid for by the owner or other person having the right of ownership is not considered to be reasonable if it would impose an undue hardship upon the owner or other person having the right of ownership and shall therefore not be required. Factors to be considered shall include, but not be limited to, the nature and cost of the accommodation or modification needed, the extent to which the accommodation or modification would materially alter the marketability of the housing, the overall size of the housing business of the owner or other person having the right of ownership, including but not limited to, the number and type of housing units, size of budget and available assets, and the ability of the owner or other person having the right of ownership to recover the cost of the accommodation or modification through a federal tax deduction. Ten percent shall be the maximum number of units for which an owner or other person having the right of ownership shall be required to pay for a modification in order to make units fully accessible to persons using a wheelchair pursuant to the requirements of this subsection.

In the event a wheelchair accessible unit becomes or will become vacant, the owner or other person having the right of ownership shall give timely notice to a person who has, within the previous twelve months, notified the owner or person having the right of ownership that such person is in need of a unit which is wheelchair accessible, and the owner or other person having the right of ownership shall give at least fifteen days notice of the vacancy to the Massachusetts rehabilitation commission, which shall maintain a central registry of accessible apartment housing under the provisions of section seventy-nine of chapter six. During such fifteen day notice period, the owner or other person having the right of ownership may lease or agree to lease the unit only if it is to be occupied by a person who is in need of wheelchair accessibility.

Notwithstanding any general or special law, by-law or ordinance to the contrary, there shall not be established or imposed a rent or other charge for such handicap-accessible housing which is higher than the rent or other charge for comparable nonaccessible housing of the owner or other person having the right of ownership.

7B. For any person to make print, or publish, or cause to be made, printed, or published any notice, statement or advertisement, with respect to the sale or rental of multiple dwelling, contiguously located, publicly assisted or other covered housing accommodations that indicates any preference, limitation, or discrimination based on race, color, religion, sex, gender identity, sexual orientation which shall not include persons whose sexual orientation involves minor children as the sex object, national origin, genetic information, ancestry, children, marital status, public assistance recipiency, or handicap or an intention to make any such preference, limitation or discrimination except where otherwise legally permitted.

8. For the owner, lessee, sublessee, or managing agent of, or other person having the right of ownership or possession of or the right to sell, rent or lease, commercial space: (1) To refuse to sell, rent, lease or otherwise deny to or withhold from any person or group of persons such commercial space because of race, color, religious creed, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information, ancestry handicap or marital status of such person or persons. (2) To discriminate against any person because of his race, color, religious creed, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information, ancestry, handicap or

marital status in the terms, conditions or privileges of the sale, rental or lease of any such commercial space or in the furnishing of facilities or services in connection therewith. (3) To cause to be made any written or oral inquiry or record concerning the race, color, religious creed, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information, ancestry, handicap or marital status of a person seeking to rent or lease or buy any such commercial space. The word "age" as used in this subsection shall not apply to persons who are minors, nor to residency in state-aided or federally-aided housing developments for the elderly nor to residency in self-contained retirement communities constructed expressly for use by the elderly and which are at least twenty acres in size and have a minimum age requirement for residency of at least fifty-five years.

9. For an employer, himself or through his agent, in connection with an application for employment, or the terms, conditions, or privileges of employment, or the transfer, promotion, bonding, or discharge of any person, or in any other matter relating to the employment of any person, to request any information, to make or keep a record of such information, to use any form of application or application blank which requests such information, or to exclude, limit or otherwise discriminate against any person by reason of his or her failure to furnish such information through a written application or oral inquiry or otherwise regarding: (i) an arrest, detention, or disposition regarding any violation of law in which no conviction resulted, or (ii) a first conviction for any of the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violations, affray, or disturbance of the peace, or (iii) any conviction of a misdemeanor where the date of such conviction or the completion of any period of incarceration resulting therefrom, whichever date is later, occurred five or more years prior to the date of such application for employment or such request for information, unless such person has been convicted of any offense within five years immediately preceding the date of such application for employment or such request for information.

No person shall be held under any provision of any law to be guilty of perjury or of otherwise giving a false statement by reason of his failure to recite or acknowledge such information as he has a right to withhold by this subsection.

Nothing contained herein shall be construed to affect the application of section thirty-four of chapter ninety-four C, or of chapter two hundred and seventy-six relative to the sealing of records.

9 1/2. For an employer to request on its initial written application form criminal offender record information; provided, however, that except as otherwise prohibited by subsection 9, an employer may inquire about any criminal convictions on an applicant's application form if: (i) the applicant is applying for a position for which any federal or state law or regulation creates mandatory or presumptive disqualification based on a conviction for 1 or more types of criminal offenses; or (ii) the employer or an affiliate of such employer is subject to an obligation imposed by any federal or state law or regulation not to employ persons, in either 1 or more positions, who have been convicted of 1 or more types of criminal offenses.

9A. For an employer himself or through his agent to refuse, unless based upon a bonafide occupational qualification, to hire or employ or to bar or discharge from employment any person by reason of his or her failure to furnish information regarding his or her admission, on one or more occasions, voluntarily or involuntarily, to any public or private facility for the care and treatment of mentally ill persons, provided that such person has been discharged from such facility or facilities and can prove by a psychiatrist's certificate that he is mentally competent to perform the job or the job for which he is applying. No application for employment shall contain any questions or requests for information regarding the admission of an applicant, on one or more

occasions, voluntarily or involuntarily, to any public or private facility for the care and treatment of mentally ill persons, provided that such applicant has been discharged from such public or private facility or facilities and is no longer under treatment directly related to such admission.

10. For any person furnishing credit, services or rental accommodations to discriminate against any individual who is a recipient of federal, state, or local public assistance, including medical assistance, or who is a tenant receiving federal, state, or local housing subsidies, including rental assistance or rental supplements, because the individual is such a recipient, or because of any requirement of such public assistance, rental assistance, or housing subsidy program.

11. For the owner, sublessees, real estate broker, assignee or managing agent of publicly assisted or multiple dwelling or contiguously located housing accommodations or other covered housing accommodations, or other person having the right of ownership or possession or right to rent or lease or sell such accommodations, or any agent or employee of such person or organization of unit owners in a condominium or housing cooperative, to refuse to rent or lease or sell or otherwise to deny to or withhold from any person such accommodations because such person has a child or children who shall occupy the premises with such person or to discriminate against any person in the terms, conditions, or privileges of such accommodations or the acquisition thereof, or in the furnishing of facilities and services in connection therewith, because such person has a child or children who occupy or shall occupy the premises with such person; provided, however, that nothing herein shall limit the applicability of any local, state, or federal restrictions regarding the maximum number of persons permitted to occupy a dwelling. When the commission or a court finds that discrimination in violation of this paragraph has occurred with respect to a residential premises containing dangerous levels of lead in paint, plaster, soil, or other accessible material, notification of such finding shall be sent to the director of the childhood lead poisoning prevention program.

This subsection shall not apply to:

(1) Dwellings containing three apartments or less, one of which apartments is occupied by an elderly or infirm person for whom the presence of children would constitute a hardship. For purposes of this subsection, an "elderly person" shall mean a person sixty-five years of age or over, and an "infirm person" shall mean a person who is disabled or suffering from a chronic illness.

(2) The temporary leasing or temporary subleasing of a single family dwelling, a single apartment, or a single unit of a condominium or housing cooperative, by the owner of such dwelling, apartment, or unit, or in the case of a subleasing, by the sublessor thereof, who ordinarily occupies the dwelling, apartment, or unit as his or her principal place of residence. For purposes of this subsection, the term "temporary leasing" shall mean leasing during a period of the owner's or sublessor's absence not to exceed one year.

(3) The leasing of a single dwelling unit in a two family dwelling, the other occupancy unit of which is occupied by the owner as his residence.

11A. For an employer, or an employer's agent, to refuse to restore certain employees to employment following an absence by reason of a parental leave taken pursuant to section 105D of chapter 149 or to otherwise fail to comply with that section, or for the commonwealth and any of its boards, departments and commissions to deny vacation credit to an employee for the fiscal year during which the employee is absent due to a parental leave taken pursuant to said section 105D of said chapter 149, or to impose any other penalty as a result of a parental leave of absence.

12. For any retail store which provides credit or charge account privileges to refuse to extend such privileges to a customer solely because said customer had attained age sixty-two or over.

13. For any person to directly or indirectly induce, attempt to induce, prevent, or attempt to prevent the sale, purchase, or rental of any dwelling or dwellings by:

(a) implicit or explicit representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular age, race, color, religion, sex, gender identity, national or ethnic origin, or economic level or a handicapped person, or a person having a child, or implicit or explicit representations regarding the effects or consequences of any such entry or prospective entry;

(b) unrequested contact or communication with any person or persons, initiated by any means, for the purpose of so inducing or attempting to induce the sale, purchase, or rental of any dwelling or dwellings when he knew or, in the exercise of reasonable care, should have known that such unrequested solicitation would reasonably be associated by the persons solicited with the entry into the neighborhood of a person or persons of a particular age, race, color, religion, sex, gender identity, national or ethnic origin, or economic level or a handicapped person, or a person having a child;

(c) implicit or explicit false representations regarding the availability of suitable housing within a particular neighborhood or area, or failure to disclose or offer to show all properties listed or held for sale or rent within a requested price or rental range, regardless of location; or

(d) false representations regarding the listing, prospective listing, sale, or prospective sale of any dwelling.

14. For any person furnishing credit or services to deny or terminate such credit or services or to adversely affect an individual's credit standing because of such individual's sex, gender identity, marital status, age or sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object; provided that in the case of age the following shall not be unlawful practices:

(1) an inquiry of age for the purpose of determining a pertinent element of creditworthiness;

(2) the use of empirically derived credit systems which consider age, provided such systems are based on demonstrably and statistically sound data and provided further that such systems do not assign a negative factor or score to any applicant who has reached age sixty-two;

(3) the offering of credit life insurance or credit disability insurance, in conjunction with any credit or services, to a limited age group;

(4) the denial of any credit or services to a person who has not attained the age of majority;

(5) the denial of any credit or services the duration of which exceeds the life expectancy of the applicant as determined by the most recent Individual Annuity Mortality Table; or

(6) the offering of more favorable credit terms to students, to persons aged eighteen to twenty-one, or to persons who have reached the age of sixty-two.

Any person who violates the provisions of this subsection shall be liable in an action of contract for actual damages; provided, however, that, if there are no actual damages, the court may assess special damages to the aggrieved party not to exceed one thousand dollars; and provided further, that any person who has been found to violate a provision of this subsection by a court of competent jurisdiction shall be assessed the cost of reasonable legal fees actually incurred.

15. For any person responsible for recording the name of or establishing the personal identification of an individual for any purpose, including that of extending credit, to require such individual to use, because of such individual's sex or marital status, any surname other than the one by which such individual is generally known.

16. For any employer, personally or through an agent, to dismiss from employment or refuse to hire, rehire or advance in employment or otherwise discriminate against, because of his handicap, any person alleging to be a qualified handicapped person, capable of performing the essential functions of the position involved with reasonable accommodation, unless the employer can demonstrate that the accommodation required to be made to the physical or mental limitations of the person would impose an undue hardship to the employer's business. For purposes of this subsection, the word employer shall include an agency which employs individuals directly for the purpose of furnishing part-time or temporary help to others.

In determining whether an accommodation would impose an undue hardship on the conduct of the employer's business, factors to be considered include:--

(1) the overall size of the employer's business with respect to the number of employees, number and type of facilities, and size of budget or available assets;

(2) the type of the employer's operation, including the composition and structure of the employer's workforce; and

(3) the nature and cost of the accommodation needed.

Physical or mental job qualification requirement with respect to hiring, promotion, demotion or dismissal from employment or any other change in employment status or responsibilities shall be functionally related to the specific job or jobs for which the individual is being considered and shall be consistent with the safe and lawful performance of the job.

An employer may not make preemployment inquiry of an applicant as to whether the applicant is a handicapped individual or as to the nature or severity of the handicap, except that an employer may condition an offer of employment on the results of a medical examination conducted solely for the purpose of determining whether the employee, with reasonable accommodation, is capable of performing the essential functions of the job, and an employer may invite applicants to voluntarily disclose their handicap for purposes of assisting the employer in its affirmative action efforts.

16A. For an employer, personally or through its agents, to sexually harass any employee.

17. Notwithstanding any provision of this chapter, it shall not be an unlawful employment practice for any person, employer, labor organization or employment agency to:

(a) observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this section, except that no such employee benefit plan shall excuse the failure to hire any person, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any person because of age except as permitted by paragraph (b).

(b) require the compulsory retirement of any person who has attained the age of sixty-five and who, for the two year period immediately before retirement, is employed in a bona fide executive or high policymaking position, if such person entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-

sharing, savings or deferred compensation plan, or any combination of such plans, of the employer, which equals, in the aggregate, at least forty-four thousand dollars.

(c) require the retirement of any employee who has attained seventy years of age and who is serving under a contract of unlimited tenure or similar arrangement providing for unlimited tenure at an independent institution of higher education, or to limit the employment in a faculty capacity of such an employee, or another person who has attained seventy years of age who was formerly employed under a contract of unlimited tenure or similar arrangement, to such terms and to such a period as would serve the present and future needs of the institution, as determined by it; provided, however, that in making such a determination, no institution shall use as a qualification for employment or reemployment, the fact that the individual is under any particular age.

18. For the owner, lessee, sublessee, licensed real estate broker, assignee, or managing agent of publicly assisted or multiple dwelling or contiguously located housing accommodations or other covered housing accommodations, or other person having the right of ownership or possession, or right to rent or lease, or sell or negotiate for the sale of such accommodations, or any agent or employee of such person or any organization of unit owners in a condominium or housing cooperative to sexually harass any tenant, prospective tenant, purchaser or prospective purchaser of property.

Notwithstanding the foregoing provisions of this section, it shall not be an unlawful employment practice for any person, employer, labor organization or employment agency to inquire of an applicant for employment or membership as to whether or not he or she is a veteran or a citizen.

Notwithstanding the provisions of any general or special law nothing herein shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, from limiting admission to or giving preference to persons of the same religion or denomination or from taking any action with respect to matters of employment, discipline, faith, internal organization, or ecclesiastical rule, custom, or law which are calculated by such organization to promote the religious principles for which it is established or maintained.

Notwithstanding the foregoing provisions of this section, (a) every employer, every employment agency, including the division of employment and training, and every labor organization shall make and keep such records relating to race, color or national origin as the commission may prescribe from time to time by rule or regulation, after public hearing, as reasonably necessary for the purpose of showing compliance with the requirements of this chapter, and (b) every employer and labor organization may keep and maintain such records and make such reports as may from time to time be necessary to comply, or show compliance with, any executive order issued by the President of the United States or any rules or regulations issued thereunder prescribing fair employment practices for contractors and subcontractors under contract with the United States, or, if not subject to such order, in the manner prescribed therein and subject to the jurisdiction of the commission. Such requirements as the commission may, by rule or regulation, prescribe for the making and keeping of records under clause (a) shall impose no greater burden or requirement on the employer, employment agency or labor organization subject thereto, than the comparable requirements which could be prescribed by Federal rule or regulation so long as no such requirements have in fact been prescribed, or which have in fact been prescribed for an employer, employment agency or labor organization under the authority of the Civil Rights Act of 1964, from time to time amended. This paragraph shall apply only to employers who on

each working day in each of twenty or more calendar weeks in the annual period ending with each date set forth below, employed more employees than the number set forth beside such date, and to labor organizations which have more members on each such working day during such period.

Period Ending.	Minimum Employees or Members.
June 30, 1965	100
June 30, 1966	75
June 30, 1967	50
June 30, 1968 and thereafter	25

Nothing contained in this chapter or in any rule or regulation issued by the commission shall be interpreted as requiring any employer, employment agency or labor organization to grant preferential treatment to any individual or to any group because of the race, color, religious creed, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information or ancestry of such individual or group because of imbalance which may exist between the total number or percentage of persons employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization or admitted to or employed in, any apprenticeship or other training program, and the total number or percentage of persons of such race, color, religious creed, national origin, sex, gender identity, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, age, genetic information or ancestry in the commonwealth or in any community, section or other area therein, or in the available work force in the commonwealth or in any of its political subdivisions.

19. (a) It shall be unlawful discrimination for any employer, employment agency, labor organization, or licensing agency to

(1) refuse to hire or employ, represent, grant membership to, or license a person on the basis of that person's genetic information;

(2) collect, solicit or require disclosure of genetic information from any person as a condition of employment, or membership, or of obtaining a license;

(3) solicit submission to, require, or administer a genetic test to any person as a condition of employment, membership, or obtaining a license;

(4) offer a person an inducement to undergo a genetic test or otherwise disclose genetic information;

(5) question a person about their genetic information or genetic information concerning their family members, or inquire about previous genetic testing;

(6) use the results of a genetic test or other genetic information to affect the terms, conditions, compensation or privileges of a person's employment, representation, membership, or the ability to obtain a license;

(7) terminate or refuse to renew a person's employment, representation, membership, or license on the basis of a genetic test or other genetic information; or

(8) otherwise seek, receive, or maintain genetic information for non-medical purposes.

[There is no paragraph (b).]

Part I ADMINISTRATION OF THE GOVERNMENT

Title XXI LABOR AND INDUSTRIES

Chapter 151B UNLAWFUL DISCRIMINATION BECAUSE OF RACE, COLOR, RELIGIOUS CREED, NATIONAL ORIGIN, ANCESTRY OR SEX

Section 5 COMPLAINTS; PROCEDURE; LIMITATIONS; BAR TO PROCEEDING; AWARD OF DAMAGES

Section 5. Any person claiming to be aggrieved by an alleged unlawful practice or alleged violation of clause (e) of section thirty-two of chapter one hundred and twenty-one B or sections ninety-two A, ninety-eight and ninety-eight A of chapter two hundred and seventy-two may, by himself or his attorney, make, sign and file with the commission a verified complaint in writing which shall state the name and address of the person, employer, labor organization or employment agency alleged to have committed the unlawful practice complained of or the violation of said clause (e) of said section thirty-two or said sections ninety-two A, ninety-eight and ninety-eight A which shall set forth the particulars thereof and contain such other information as may be required by the commission. The attorney general may, in like manner, make, sign and file such complaint. The commission, whenever it has reason to believe that any person has been or is engaging in an unlawful practice or violation of said clause (e) of said section thirty-two or said sections ninety-two A, ninety-eight and ninety-eight A, may issue such a complaint. Any employer whose employees, or some of them, refuse or threaten to refuse to cooperate with the provisions of this chapter, may file with the commission a verified complaint asking for assistance by conciliation or other remedial action.

After the filing of any complaint, the chairman of the commission shall designate one of the commissioners to make, with the assistance of the commission's staff, prompt investigation in connection therewith. If such commissioner shall determine after such investigation that no probable cause exists for crediting the allegations of the complaint, the commission shall, within ten days from such determination, cause to be issued and served upon the complainant written notice of such determination, and the said complainant or his attorney may, within ten days after such service, file with the commission a written request for a preliminary hearing before the commission to determine probable cause for crediting the allegations of the complaint, and the commission shall allow such request as a matter of right; provided, however, that such a preliminary hearing shall not be subject to the provisions of chapter thirty A. If such commissioner shall determine after such investigation or preliminary hearing that probable cause exists for crediting the allegations of a complaint relative to a housing practice, the commissioner shall immediately serve notice upon the complainant and respondent of their right to elect judicial determination of the complaint as an alternative to determination in a hearing before the commission. If a complainant or respondent so notified wishes to elect such judicial determination, he shall do so in writing within twenty days of receipt of the said notice. The person making such election shall give notice of such election to the commission and to all other complainants and respondents to whom the probable cause finding relates. The commission, upon receipt of such notice, shall dismiss the complaint pending before it without prejudice and the complainant shall be barred from subsequently bringing a complaint on the same

matter before the commission. If any complainant or respondent elects judicial determination as aforesaid, the commission shall authorize, and not later than thirty days after the election is made the attorney general shall commence and maintain, a civil action on behalf of the complainant in the superior court for the county in which the unlawful practice occurred. Any complainant may intervene as of right in said civil action. If the court in such civil action finds that a discriminatory housing practice has occurred or is about to occur, the court may grant any relief which a court could grant with respect to such discriminatory housing practice in a civil action under section nine. Any relief so granted that would accrue to an aggrieved person in a civil action commenced by that aggrieved person under said section nine shall also accrue to that aggrieved person in a civil action under this section. If such commissioner shall determine after such investigation or preliminary hearing that probable cause exists for crediting the allegations of any complaint and no complainant or respondent has elected judicial determination of the matter, he shall immediately endeavor to eliminate the unlawful practice complained of or the violation of said clause (e) of said section thirty-two or said sections ninety-two A, ninety-eight and ninety-eight A by conference, conciliation and persuasion. The members of the commission and its staff shall not disclose what has occurred in the course of such endeavors, provided that the commission may publish the facts in the case of any complaint which has been dismissed, and the terms of conciliation when the complaint has been so disposed of. In case of failure so to eliminate such practice or violation, or in advance thereof if in his judgment circumstances so warrant, he shall cause to be issued and served in the name of the commission, a written notice, together with a copy of such complaint, as the same may have been amended, requiring the person, employer, labor organization or employment agency named in such complaint, hereinafter referred to as respondent, to answer the charges of such complaint at a hearing before the commission, at a time and place to be specified in such notice. The place of any such hearing shall be the office of the commission or such other place as may be designated by it. Before or after a determination of probable cause hereunder such commissioner may also file a petition in equity in the superior court in any county in which the unlawful practice which is the subject of the complaint occurs, or in a county in which a respondent resides or transacts business, or in Suffolk county, seeking appropriate injunctive relief against such respondent, including orders or decrees restraining and enjoining him from selling, renting or otherwise making unavailable to the complainant any housing accommodations or public accommodations with respect to which the complaint is made, pending the final determination of proceedings under this chapter. An affidavit of such notice shall forthwith be filed in the clerk's office. The court shall have power to grant such temporary relief or restraining orders as it deems just and proper. The case in support of the complaint shall be presented before the commission by one of its attorneys or agents or by an attorney retained by the complainant, and the commissioner who shall have previously made the investigation and caused the notice to be issued shall not participate in the hearing except as a witness, nor shall he participate in the deliberations of the commission in such case except when necessary to decide an appeal to the full commission; and the aforesaid endeavors at conciliation shall not be received in evidence. If an investigating commissioner determines that probable cause exists to credit the allegations of a complainant that a respondent has refused to sell, rent or lease, or to negotiate in the sale, rental, or leasing of, housing accommodations or commercial space and if he determines that such respondent is a nonresident of the commonwealth and cannot be personally served with process in the commonwealth, such investigating commissioner may file a petition in equity in the nature of an in rem proceeding seeking appropriate injunctive relief against such property with respect to which a complaint has been made, including orders or decrees restraining and enjoining any sale, rental, lease, or other disposition of such property which would render it unavailable to the complainant pending the final determination of proceedings under this chapter. Such commissioner shall send by registered mail, with return receipt requested, a copy of such petition to the last

address of such respondent known to the commissioner. An affidavit of compliance herewith, and the respondent's return receipt or other proof of actual notice, if received, shall be filed in the case on or before the return day of the process or within such further time as the court may allow. A copy of the order or decree of the court running against such property of a nonresident respondent shall be recorded in the registry of deeds in the county wherein such housing accommodations or commercial space is located, and a copy of such order or decree shall be attached in a conspicuous place to the property which has been the subject of a complaint under section four by the sheriff of the county wherein such property is located, or by his authorized agent or employee. Any person purchasing housing accommodations or commercial space, subsequent to the recording of the order or decree in the registry of deeds, shall be, as a matter of law, bound by the terms of any order which the commission has made or may make relating to such property which has been the subject of an order or decree of the superior court. Any person renting or leasing housing accommodations or commercial space subsequent to the attachment of a copy of an order or decree referred to above by the sheriff of the county wherein such property is located or by his authorized agent or employee shall be, as a matter of law, bound by the terms of any order which the commission has made or may make relating to such property. The respondent may file a written verified answer to the complaint and appear at such hearing in person or otherwise, with or without counsel, and submit testimony. In the discretion of the commission, the complainant may be allowed to intervene and present testimony in person or by counsel. The commission or the complainant shall have the power reasonably and fairly to amend any complaint, and the respondent shall have like power to amend his answer. The commission shall not be bound by the strict rules of evidence prevailing in courts of law or equity. The testimony taken at the hearing shall be under oath and be transcribed at the request of any party. If, upon all the evidence at the hearing the commission shall find that a respondent has engaged in any unlawful practice as defined in section four or violation of said clause (e) of said section thirty-two or said sections ninety-two A, ninety-eight and ninety-eight A, the commission shall state its findings of fact and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful practice or violation of said clause (e) of said section thirty-two or said sections ninety-two A, ninety-eight and ninety-eight A to take such affirmative action, including but not limited to, hiring, reinstatement or upgrading of employees, with or without back pay, or restoration to membership in any respondent labor organization, as, in the judgment of the commission, will effectuate the purposes of this chapter or of said clause (e) of said section thirty-two or said sections ninety-two A, ninety-eight and ninety-eight A, and including a requirement for report of the manner of compliance. Such cease and desist orders and orders for affirmative relief may be issued to operate prospectively. If, upon all the evidence, the commission shall find that a respondent has not engaged in any such unlawful practice or violation of said clause (e) of said section thirty-two or said sections ninety-two A, ninety-eight and ninety-eight A, the commission shall state its findings of fact and shall issue and cause to be served on the complainant an order dismissing the said complaint as to such respondent. In addition to any such relief, the commission shall award reasonable attorney's fees and costs to any prevailing complainant. A copy of its order shall be delivered in all cases to the attorney general and such other public officers as the commission deems proper. The commission shall establish rules of practice to govern, expedite and effectuate the foregoing procedure and its own actions thereunder. Any complaint filed pursuant to this section must be so filed within 300 days after the alleged act of discrimination. The institution of proceedings under this section, or an order thereunder, shall not be a bar to proceedings under said sections ninety-two A, ninety-eight and ninety-eight A, nor shall the institution of proceedings under said sections ninety-two A, ninety-eight and ninety-eight A, or a judgment thereunder, be a bar to proceedings under this section.

If upon all the evidence at any such hearing the commission shall find that a respondent has engaged in any such unlawful practice relative to housing or real estate or violated clause (e) of said section thirty-two it may, in addition to any other action which it may take under this section, award the petitioner damages, which damages shall include, but shall not be limited to, the expense incurred by the petitioner for obtaining alternative housing or space, for storage of goods and effects, for moving and for other costs actually incurred by him as a result of such unlawful practice or violation. Any person claiming to be aggrieved by such an award of damages may, notwithstanding the provisions of section six and within ten days of notice of such award, bring a petition in the municipal court of the city of Boston or in the district court within the judicial district of which the respondent resides, addressed to the justice of the court, praying that the action of the commission in awarding damages be reviewed by the court. After such notice to the parties as the court deems necessary, it shall hear witnesses, review such action, and determine whether or not upon all the evidence such an award was justified and thereafter affirm, modify or reverse the order of the commission. The decision of the court shall be final and conclusive upon all the parties as to all matters of fact.

If, upon all the evidence at any such hearing, the commission shall find that a respondent has engaged in any such unlawful practice, it may, in addition to any other action which it may take under this section, assess a civil penalty against the respondent:

(a) in an amount not to exceed $10,000 if the respondent has not been adjudged to have committed any prior discriminatory practice;

(b) in an amount not to exceed $25,000 if the respondent has-been adjudged to have committed one other discriminatory practice during the 5?year period ending on the date of the filing of the complaint; and

(c) in an amount not to exceed $50,000 if the respondent has been adjudged to have committed 2 or more discriminatory practices during the 7?year period ending on the date of the filing of the complaint.Notwithstanding the aforesaid provisions, if the acts constituting the discriminatory practice that is the object of the complaint are committed by the same natural person who has been previously adjudged to have committed acts constituting a discriminatory practice, then the civil penalties set forth in clauses (b) and (c) may be imposed without regard to the period of time within which any subsequent discriminatory practice occurred.

Part I ADMINISTRATION OF THE GOVERNMENT

Title XXI LABOR AND INDUSTRIES

Chapter 151B UNLAWFUL DISCRIMINATION BECAUSE OF RACE, COLOR, RELIGIOUS CREED, NATIONAL ORIGIN, ANCESTRY OR SEX

Section 9 CONSTRUCTION AND ENFORCEMENT OF CHAPTER; INCONSISTENT LAWS; EXCLUSIVENESS OF STATUTORY PROCEDURE; CIVIL REMEDIES; SPEEDY TRIAL; ATTORNEY'S FEES AND COSTS; DAMAGES

Section 9. This chapter shall be construed liberally for the accomplishment of its purposes, and any law inconsistent with any provision of this chapter shall not apply, but nothing contained in this chapter shall be deemed to repeal any provision of any other law of this commonwealth relating to discrimination; but, as to acts declared unlawful by section 4, the administrative procedure provided in this chapter under section 5 shall, while pending, be exclusive; and the final determination on the merits shall exclude any other civil action, based on the same grievance of the individual concerned.

Any person claiming to be aggrieved by a practice made unlawful under this chapter or under chapter one hundred and fifty-one C, or by any other unlawful practice within the jurisdiction of the commission, may, at the expiration of ninety days after the filing of a complaint with the commission, or sooner if a commissioner assents in writing, but not later than three years after the alleged unlawful practice occurred, bring a civil action for damages or injunctive relief or both in the superior or probate court for the county in which the alleged unlawful practice occurred or in the housing court within whose district the alleged unlawful practice occurred if the unlawful practice involves residential housing. The petitioner shall notify the commission of the filing of the action, and any complaint before the commission shall then be dismissed without prejudice, and the petitioner shall be barred from subsequently bringing a complaint on the same matter before the commission. Any person claiming to be aggrieved by an unlawful practice relative to housing under this chapter, but who has not filed a complaint pursuant to section five, may commence a civil action in the superior or probate court for the county in which the alleged unlawful practice occurred or in the housing court within whose district the alleged unlawful practice occurred; provided, however, that such action shall not be commenced later than one year after the alleged unlawful practice has occurred. An aggrieved person may also seek temporary injunctive relief in the superior, housing or probate court within such county at any time to prevent irreparable injury during the pendency of or prior to the filing of a complaint with the commission.

An action filed pursuant to this section shall be advanced for a speedy trial at the request of the petitioner. If the court finds for the petitioner, it may award the petitioner actual and punitive damages. If the court finds for the petitioner it shall, in addition to any other relief and irrespective of the amount in controversy, award the petitioner reasonable attorney's fees and costs unless special circumstances would render such an award unjust. The commission shall, upon the filing of any complaint with it, notify the aggrieved person of his rights under this section.

Any person claiming to be aggrieved by a practice concerning age discrimination in employment made unlawful by section four may bring a civil action under this section for damages or injunctive relief, or both, and shall be entitled to a trial by jury on any issue of fact in an action for damages regardless of whether equitable relief is sought by a party in such action. If the court finds for the petitioner, recovery shall be in the amount of actual damages; or up to three, but not less than two, times such amount if the court finds that the act or practice complained of was committed with knowledge, or reason to know, that such act or practice violated the provisions of said section four. The provisions set forth in the first, second and third paragraphs shall be applicable to such complaint or action to the extent that such provisions do not conflict with the provisions set forth in this paragraph.

804 CMR 03.00

3.01: Employment Discrimination Guidelines

(1) Definitions.

As used in 804 CMR 3.00:

Age: The term "age" includes any duration of time since an individual's birth of greater than 40 years.

Employee: The term "employee" means an individual employed by an employer in a full or part time capacity.
The term "employee" does not include any individual employed in the domestic service of any individual.
The term "employee" does not include independent contractors.
Any individual employed by his or her parent(s), spouse or child, may not maintain a claim against his or her parent(s), spouse or child under the Fair Employment Practices Law.

Employer: The term "employer" means one or more individuals, governments, government agencies, political subdivisions, labor organizations, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, or receivers, having six or more employees. The term employer does not include a club exclusively social, or a fraternal association or corporation, if such club, association or corporation is not organized for private profit. Nonprofit clubs, associations, or corporations which are not exclusively social are not excluded.

Employment Agency: The term "employment agency" includes any person or entity undertaking to procure employees or opportunities to work.

Fair Employment Practices Law: The term "Fair Employment Practices Law" refers to M.G.L. c. 151B.

Protected Class: The term "protected class status" shall include race, color, religious creed, national origin, sex, sexual orientation, age and ancestry. Qualified handicapped persons shall be deemed as members of a protected class and as such shall have protected class status.

Sexual Orientation: The term "sexual orientation" shall not include persons whose sexual orientation involves children as the sex object.

(2) Applicable Law.

The Fair Employment Practices Law, found in M.G.L. c. 151B, s.4 guarantees that no person shall suffer discrimination in the terms, conditions or privileges of his or her employment because of his or her protected class status, unless based upon a bona fide occupational qualification.

(3) Bona Fide Occupational Qualification.

a. Application. M.G.L. c. 151B does not define the term "bona fide occupational qualification [BFOQ]," but the Commission in applying the term takes the position that it provides only the narrowest of exceptions.

b. Examples. The Commission will decide BFOQ issues on a case by case basis, but the following examples may provide guidance.

1. A stereotypical view of a category of people will never be a BFOQ, e.g., "women cannot do heavy, physical labor." Thus, employment decisions based on a stereotype that the turnover rate among women is higher than men, or that women are less likely than men to assent to transfer to other locations of the employer in other cities or states, do not benefit from the BFOQ defense.

2. A mere customer or coworker preference is not a BFOQ, e.g., "customers prefer to deal with people of the same race" or "employees are uncomfortable working with people of different sexual orientation."

The following text is effective 12/29/95

3. There are some circumstances, involving customer preferences which may constitute BFOQs, including:

   a. The need for a "genuine" member of a class to satisfy a job requirement may be a BFOQ,e.g., an actor to play a male role or a female to model feminine apparel.

   b. Where considerations of personal privacy may be a necessary element of the conduct of a business, and therefore, a BFOQ, e.g, hiring only men or women respectively for duty in men's or women's washrooms or locker rooms.

MCAD 804 CMRs

804 CMR 01.00
Regulations Governing MCAD

804 CMR 02.00
Housing Discrimination

804 CMR 03.00
Employment Discrimination

804 CMR 08.00
Maternity Discrimination

804 CMR 10.00
Enforcement

804 CMR 11.00
Training Fees

804 CMR 12.00
Fees for Public Records

4. The fact that the employer may have to provide separate facilities for a person of the opposite sex is not a BFOQ.

5. The fact that members of one group have been traditionally hired is not a BFOQ.

(4) Unlawful Employment Practices.

a. Unlawful Employment Practices By Employers.

1. Applications/Advertising. It is unlawful for an employer, his or her agent, or an employment agency, to print or circulate any statements or to use any form of application for employment or to make any inquiry or record or advertisement in connection with employment, which expresses, directly or indirectly, any limitation, specification, preference or discrimination as to the protected class status of any prospective applicant for employment unless based upon a bona fide occupational qualification. The publication by newspapers or other publications of help wanted or classified advertisements which violate the Fair Employment Practices Law may be viewed by the Commission as aiding or abetting an act of discrimination.

2. Hiring/Discharge. It is unlawful for an employer or his or her agent to discharge or refuse to hire or to bar from employment any individual because of protected class status, unless based upon a bona fide occupational qualification.

3. Terms of Employment. It is unlawful for an employer, or.his or her agent, to discriminate against any individual in matters relating to compensation, terms, conditions or privileges of employment because of protected class status, unless based upon a bona fide occupational qualification.

4. Sexual Harassment. It is unlawful for an employer personally or through an agent to sexually harass any employee. The term "sexual harassment" shall mean sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:

    a. submission to or rejection of such advances, requests or conduct is made either explicitly or implicitly a term or condition of employment or as a basis for employment decisions;

    b. such advances, requests or conduct have the purpose or effect of unreasonably interfering with an individual's work performance by creating an intimidating, hostile, humiliating or sexually offensive work environment. Discrimination on the basis of sex shall include but not be limited to sexual harassment.

5. Marital Status. Any distinction made by an employer between married and unmarried women which is not made between married and unmarried men, or vice versa, is unlawful discrimination.

b. Unlawful Employment Practices By Labor Organizations. It is unlawful for a labor organization, on the basis of protected class status, to do the following, unless based upon a BFOQ:

1. To exclude from full membership rights such individual.

2. To expel from its membership such individual.

3. To discriminate in any way against any of its members or against any employer or any individual employed by an employer.The following text is effective 12/29/95
Any distinction made by a labor organization between married and unmarried women which is not made between married and unmarried men, or vice versa, is unlawful discrimination.

c. Unlawful Employment Practices By Employment Agencies

1. It is unlawful for an employment agency to make any statements to a prospective employer which are intended to directly or indirectly disclose the protected class status of the prospective applicant for employment, unless based upon a bona fide occupational qualification.

2. It is unlawful for an employment agency to solicit and interview job applicants on the basis of protected class status unless such status is a bona fide occupational qualification.

3. An employment agency which accepts a job order containing an unlawful specification will share legal responsibility with the employer placing the job order.

4. It is unlawful for an employment agency to accept or process job orders from employers which directly or indirectly limit or specify the protected class status of any applicant for employment, unless based upon a bona fide occupational qualification.

5. Any distinction made by an employment agency between married and unmarried women which is not made between married and unmarried men, or vice versa, is unlawful discrimination.

d. Unlawful Employment Practices By Employers, Labor Organizations, Employment Agencies or other Persons or Entities:

1. Aiding and Abetting. It is unlawful for anyone, whether an employer, employee, or other person, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under the Fair Employment Practices Law or to attempt to do so.

2. Interference. It is unlawful for any person to coerce, intimidate, threaten, or interfere with another person in the exercise or enjoyment of any right granted or protected under the Fair Employment Practices Law, or to coerce, intimidate, threaten or interfere with such other person for having aided or encouraged any other person in the exercise or enjoyment of any such right, granted or protected by the Fair Employment Practices Law.

3. Retaliation. It is unlawful for any person, employer, labor organization, or employment agency to retaliate or otherwise discriminate against any individual because that individual has opposed any practices forbidden by the Fair Employment Practices Law, or has testified or assisted in any proceeding or investigation under that law.

(5) Unlawful Employment Practices With Respect To Handicapped Individuals.

a. The term "handicap" means:

1. a physical or mental impairment which substantially limits one or more major life activities of a person;

2. a record of having such impairment; or

3. being regarding as having such impairment. The term "handicapped person" means any person who has a handicap. The term "major life activities" means functions, including, but not limited to, caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.

b. The term "qualified handicapped person" means a handicapped person who is capable of performing the essential functions of the position, with or without reasonable accommodation.

c. An accommodation is "reasonable" if it does not impose undue hardship on the employer.

d. It is unlawful for any employer, personally or through an agent, to dismiss from employment, or refuse to hire, rehire or advance in employment or otherwise discriminate against a qualified handicapped person because of his or her handicap.

e. In determining whether an accommodation would impose an undue hardship on the conduct of the employer's business, factors to be considered include:

1. the overall size of the employer's business with respect to the number of employees, number and type of facilities, and size of budget or available assets;

2. the type of the employer's operation, including the compensation and structure of the employer's workforce; and

The following text is effective 12/29/95

3. the nature and cost of the accommodation needed.

f. Any physical or mental job requirement with respect to hiring, promotion, demotion or dismissal from employment or any other change in employment status or responsibilities shall be functionally related to the specific job or jobs for which the individual is being considered and shall be consistent with the safe and lawful performance of the job.

(6) Special Provisions Relating to Age Discrimination.

Notwithstanding any provision of 804 CMR 3.00, it shall not be an unlawful employment practice for any person, employer, labor organization or employment agency to:

a. observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of 804 CMR 3.01(6), except that no such employee benefit plan shall excuse the failure to hire any person, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any person because of age except as permitted by 804 CMR 3.01(6)(b).

b. require the compulsory retirement of any person who has attained the age of 65 and for the two year period immediately before retirement, is employed in a bona fide executive or high policy-making position, if such person is entitled to an immediate non-forfeitable annual retirement benefit from a pension, profit-sharing, savings or deferred compensation plan, or any combination of such plans of the employer, which equals in the aggregate, at least $44,000.

c. require the retirement of any employee who has attained 70 years of age and who is serving under a contract of unlimited tenure or similar arrangement at an independent institution of higher education, or to limit the employment in a faculty capacity of such an employee, or another person who has attained 70 years of age who is formally employed under a contract of unlimited tenure or similar arrangement, to such terms and to such a period as would serve the present and future needs of the institution as determined by it; provided, however, that in making such a determination, no institution shall use as a qualification for employment or re-employment the fact that the individual is under any particular age.

(7) Special Provisions Relating to Religious Discrimination.

a. Definition of Religious Organization. Although religious organizations are included in the definition of employer, nothing in the employment practices law shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, and which limits membership, enrollment, admission or participation to members of that religion, from giving preference in hiring or employment to members of the same religion or from

taking any action with respect to matters of employment, discipline, faith, internal organization, or ecclesiastical rule, custom, or law which are calculated by such organization to promote the religious principles for which it is established or maintained.

b. Reasonable Accommodation to the Religious Needs of Employees or Prospective Employees.

1. It is unlawful for an employer to impose upon an employee or prospective employee as a condition of obtaining or retaining employment any terms or conditions which would require the individual to violate or forego a practice required by his or her religion. This includes but is not limited to requiring an employee or prospective employee to work on any day or portion thereof that the employee observes as a sabbath or holy day.

a. In requesting an absence for religious purposes, the employee or prospective employee:

i. must demonstrate that observance of the sabbath or holy day is a required practice of his or her religion;

The following text is effective 12/29/95

ii. must notify his or her employer at least ten days in advance of the requested absence that he or she intends to take the absence for religious purposes;

iii. may include a reasonable amount of time for travel to and from work in the request for time of

b. The employer may require the employee to make up the absence at a mutually convenient time.

c. The employer is not required to compensate an employee for any religious absence requested in accordance with the requirements of the statute.

2. The employee shall have the burden of proof as to the required practices of his or her religion.

3. An employer shall make reasonable accommodation to the religious needs of employees or prospective employees provided that such accommodation shall not pose an undue hardship in the conduct of the employer's business.

a. Examples of undue hardship include:

i. Inability to provide services which are required by federal or state law or regulation;

ii. Situations which compromise public health and safety;

iii. Inability to transact business without the employee's presence, where his or her work cannot be performed by another employee who has substantially similar qualifications during the period of absence;

iv. The employee's presence is needed to alleviate an emergency situation.

b. It is the employer's burden to demonstrate that making the accommodation poses an undue hardship.

(8) Special Provisions Relating to Maternity Leave.

a. Definition. The term "maternity leave" means a period of time, not exceeding eight weeks, that a female employee is absent from employment for the purpose of giving birth or adopting a child.

b. Eligibility for Maternity Leave. A female employee is eligible for maternity leave if:

1. she has completed the initial probationary period, if any, set by the terms of her employment; or has been employed by the same employer for at least three consecutive months as a full-time employee; and

2. she is absent from such employment for a period not exceeding eight weeks for the purpose of:

a. giving birth; or

b. adopting a child under the age of 18; or

c. adopting a child under the age of 23, if the child is mentally or physically disabled; and

3. she gives her employer at least two weeks' notice of her anticipated date of departure and intention to return.

c. Rights of a Maternity Leave Employee to Return to Employment. If a female employee is eligible for maternity leave, as set forth above in 804 CMR 3.01(8)(b), she shall:

1. be restored to her previous, or similar, position with the same status, pay, length of service credit and seniority, wherever applicable, as of the date of her leave, and

2. such maternity leave shall not affect her right to receive vacation time, sick leave, bonuses, advancement, seniority, length of service credit, benefits, plans or programs for which she was eligible, wherever applicable, at the date of her leave; and

3. such maternity leave shall not affect her right to be included in any system of accruing seniority or accruing benefits, if such benefits would accrue while an employee is on leave for sickness, disability or any other leaves. In all such cases, when such employee returns, her seniority date will remain the same as it was prior to her maternity leave.

d. Rights of the Employer. An employer is not required to:

1. pay a female employee on maternity leave, such payment is at the discretion of the employer; or

The following text is effective 12/29/95

2. restore an employee on maternity leave to her previous position, or similar position, if other employees of equal length of service credit and status in the same or similar position have been laid off due to economic conditions or other changes in operating conditions affecting employment during the period of such maternity leave. Notwithstanding the previous sentence, the employee on maternity leave shall retain any preferential consideration for another position to which she may be entitled as of the date of her leave; or

3. include the maternity leave of a female employee in the computation of benefits, rights, and advantages incident to her employment position; or

4. provide for the cost of any benefits, plans, or programs during the period of maternity leave unless such employer so provides for all employees on leave of absence.

e. The provisions of 804 CMR 3.01(8) shall be applicable to both married and unmarried females.

f. Nothing in 804 CMR 3.01 shall be construed to affect any bargaining agreement or company policy which provides for greater or additional benefits than those required under 804 CMR 3.01.

g. Pre-Employment Inquiries. As a general rule, an employer may seek information which is directly related to the applicant's ability to perform the job for which he or she is applying. As a general rule, an employer may not make inquiries, the response to which would likely disclose the applicant's protected class status. An employer may invite applicants to voluntarily disclose their protected class status for purposes of assisting the employer in its affirmative action efforts. The following chart explains the application of these principles with respect to different areas of inquiry during employment interviews or on application forms.

3.02: Permissible Inquiries

Age

Employers May Ask

Generally; the only proper question is, "Are you under 18, yes or no?"

Questions about age may be allowed if necessary to satisfy the provisions of a state or federal law (for example, certain public safety positions have age limits for hiring and retiring). Also, if the Commission has previously identified age as a bona fide occupational qualification for the position.

Employers May Not Ask

Inquiry into the date of birth or age of the applicant, except as necessary to satisfy the provisions of a state or federal law.

Disability/Handicap

Employers May Ask

No questions.

Employers May Not Ask

Inquiry into whether the applicant has a physical or mental disability, handicap or about the nature or severity of the disability/handicap.

Inquiry into whether an applicant is alcoholic or drug addicted.

Inquiry into whether an applicant has AIDS.

National Origin, Ancestry, Citizenship

Employers May Ask

"Are you legally authorized to work in the United States?"

An employer may require an employee to produce documentation which evidences his or her identity and employment eligibility under federal immigration laws.

Employers May Not Ask

Inquiry into the birthplace of an applicant or the birthplace of his or her parent(s), spouse and/or other close relatives.

Inquiry into the national origin ancestry or ethnicity of an applicant.

Inquiry into whether an applicant for employment or an applicant's parent(s), and/or spouse are nationalized or native born citizens of the United States.

Medical Examinations

Employers May Ask

Once an offer of employment has been made, an employer may condition that offer on the results of a medical examination conducted solely for the purpose of determining whether the employee, with or without reasonable accommodation, is capable of performing the essential functions of the job.

The following text is effective 12/29/95

Race, Color

Employers May Ask

No questions.

Employers May Not Ask

Inquiry into the race or color of an applicant.

Photograph

Employers May Ask

No questions.

Employers May Not Ask

An employer cannot ask for photograph to accompany an application.

Religious Creed

Employers May Ask

No questions, except by religious organizations as provided in 804 CMR 3.01(7)(a).

Employers May Not Ask

Inquiry into the religious denomination or practices of an applicant, his or her religious obligations, or what religious holidays he or she observes.

Sex (Gender)

Employers May Ask

Generally, no questions. However, questions regarding gender may be permissible if they relate to a bona fide occupational qualification, which has been ruled to be a legitimate requirement for a particular position, as provided in 804 CMR 3.01(3)(b)3..

Employers May Not Ask

Inquiry into an applicant's maiden name or any question that pertain to only one sex (for example inquiries into marital status only asked of women). Inquiries into whether applicant has children, plans to have children, or has child care arrangements.

Sexual Orientation

Employers May Ask

No questions.

Employers May Not Ask

Inquiry into applicant's sexuality (gay, bisexual, lesbian, heterosexual).

Criminal Record

Employers May Ask

Employers may ask the following series of questions:

1. Have you been convicted of a felony? Yes or no?
2. Have you been convicted of a misdemeanor within the past five years (other than a first conviction for any of the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violations, affray or disturbance of the

peace)? Yes or no?

3. Have you completed a period of incarceration within the past five years for any misdemeanor (other than a first conviction for any of the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violations, affray or disturbance of the peace)? Yes or no?

4. If the answer to question number 3 above is "yes" please state whether you were convicted more than five years ago for any offense (other than a first conviction for any of the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violations, affray or disturbance of the peace)? Yes or no? Some employers are authorized to request, receive, view and/or hold criminal offender record information pursuant to state or federal law. Any inquiry into the criminal record of an applicant must also contain language pursuant to M.G.L. c. 276, s. 100A.

Employers May Not Ask

1. It is unlawful for an employer to make any inquiry of an applicant or employee regarding: 1. An arrest, detention or disposition regarding any violation of law in which no conviction resulted;

2. First convictions for the misdemeanors of drunkenness, simple assault, speeding, minor traffic violations, affray or disturbance of the peace. For the purposes 804 CMR 3.02 minor traffic violations include any moving traffic violation other than reckless driving, driving to endanger and motor vehicle homicide.

3. Any conviction of a misdemeanor where the date of the conviction or the completion of any period of incarceration resulting therefrom, which ever date is later, occurred five or more years prior to the date of such inquiry, unless such person has been convicted of any offense within five years immediately preceding the date of the inquiry.

4. No person shall be held under any provision of any law to be guilty of perjury or of otherwise giving a false statement by reason of his failure to recite or acknowledge such information as he has a right to withhold by 804 CMR 3.02.

Education, Experience, References, Organizations

Employers May Ask

Inquiry into the academic, vocational or professional education of an applicant for employment. Inquiry into the work experience shall also contain a statement that the applicant may include in such history any verified work performed on a volunteer basis. Inquiry into references.

Employers May Not Ask

Questions about education designed to determine how old the applicant is. Inquiry into the organizations which the applicant for employment is a member, the nature, name or character of which would likely disclose the applicant's protected class status.

Lie Detector Test

Employers May Ask

No questions.

Employers May Not Ask

It is unlawful to require administer a lie detector test as a condition of employment or continued employment.

Regulatory Authority

804 CMR 3.00: M.G.L c. 151B, s.3.

Did you find the information you were looking for on this page? *

- Yes
- No

Send Feedback

Acts (2012)

Chapter 369

AN ACT FOR THE HUMANITARIAN MEDICAL USE OF MARIJUANA.

Be it enacted by the People, and by their authority, as follows:

Section 1. Purpose and Intent.

The citizens of Massachusetts intend that there should be no punishment under state law for qualifying patients, physicians and health care professionals, personal caregivers for patients, or medical marijuana treatment center agents for the medical use of marijuana, as defined herein.

Section 2. As used in this Law, the following words shall, unless the context clearly requires otherwise, have the following meanings:

(A) “Card holder” shall mean a qualifying patient, a personal caregiver, or a dispensary agent of a medical marijuana treatment center who has been issued and possesses a valid registration card.

(B) “Cultivation registration” shall mean a registration issued to a medical marijuana treatment center for growing marijuana for medical use under the terms of this Act, or to a qualified patient or personal caregiver under the terms of Section 11.

(C) “Debilitating medical condition” shall mean:

Cancer, glaucoma, positive status for human immunodeficiency virus, acquired immune deficiency syndrome (AIDS), hepatitis C, amyotrophic lateral sclerosis (ALS), Crohn's disease, Parkinson's disease, multiple sclerosis and other conditions as determined in writing by a qualifying patient's physician.

(D) “Department” shall mean the Department of Public Health of the Commonwealth of Massachusetts.

(E) “Dispensary agent” shall mean an employee, staff volunteer, officer, or board member of a non-profit medical marijuana treatment center, who shall be at least twenty-one (21) years of age.

(F) “Enclosed, locked facility” shall mean a closet, room, greenhouse, or other area equipped with locks or other security devices, accessible only to dispensary agents, patients, or personal caregivers.

(G) “Marijuana,” has the meaning given “marihuana” in Chapter 94C of the General Laws.

(H) “Medical marijuana treatment center” shall mean a not-for-profit entity, as defined by Massachusetts law only, registered under this law, that acquires, cultivates, possesses, processes (including development of related products such as food, tinctures, aerosols, oils, or ointments), transfers, transports, sells, distributes, dispenses, or administers marijuana, products containing marijuana, related supplies, or educational materials to qualifying patients or their personal caregivers.

(I) “Medical use of marijuana” shall mean the acquisition, cultivation, possession, processing, (including development of related products such as food, tinctures, aerosols, oils, or ointments), transfer, transportation, sale, distribution, dispensing, or administration of marijuana, for the benefit of qualifying patients in the treatment of debilitating medical conditions, or the symptoms thereof.

(J) “Personal caregiver” shall mean a person who is at least twenty-one (21) years old who has agreed to assist with a qualifying patient's medical use of marijuana. Personal caregivers are prohibited from consuming marijuana obtained for the personal, medical use of the qualifying patient.

An employee of a hospice provider, nursing, or medical facility providing care to a qualifying patient may also serve as a personal caregiver.
(K) “Qualifying patient” shall mean a person who has been diagnosed by a licensed physician as having a debilitating medical condition.
(L) “Registration card” shall mean a personal identification card issued by the Department to a qualifying patient, personal caregiver, or dispensary agent. The registration card shall verify that a physician has provided a written certification to the qualifying patient, that the patient has designated the individual as a personal caregiver, or that a medical treatment center has met the terms of Section 9 and Section 10 of this law. The registration card shall identify for the Department and law enforcement those individuals who are exempt from Massachusetts criminal and civil penalties for conduct pursuant to the medical use of marijuana.
(M) “Sixty-day supply” means that amount of marijuana that a qualifying patient would reasonably be expected to need over a period of sixty days for their personal medical use.
(N) “Written certification” means a document signed by a licensed physician, stating that in the physician's professional opinion, the potential benefits of the medical use of marijuana would likely outweigh the health risks for the qualifying patient. Such certification shall be made only in the course of a bona fide physician-patient relationship and shall specify the qualifying patient's debilitating medical condition(s).
Section 3. Protection from State Prosecution and Penalties for Health Care Professionals
A physician, and other health care professionals under a physician's supervision, shall not be penalized under Massachusetts law, in any manner, or denied any right or privilege, for:
(a) Advising a qualifying patient about the risks and benefits of medical use of marijuana; or
(b) Providing a qualifying patient with written certification, based upon a full assessment of the qualifying patient's medical history and condition, that the medical use of marijuana may benefit a particular qualifying patient.
Section 4. Protection From State Prosecution and Penalties for Qualifying Patients and Personal Caregivers
Any person meeting the requirements under this law shall not be penalized under Massachusetts law in any manner, or denied any right or privilege, for such actions.
A qualifying patient or a personal caregiver shall not be subject to arrest or prosecution, or civil penalty, for the medical use of marijuana provided he or she:
(a) Possesses no more marijuana than is necessary for the patient's personal, medical use, not exceeding the amount necessary for a sixty-day supply; and
(b) Presents his or her registration card to any law enforcement official who questions the patient or caregiver regarding use of marijuana.
Section 5. Protection From State Prosecution and Penalties for Dispensary Agents.
A dispensary agent shall not be subject to arrest, prosecution, or civil penalty, under Massachusetts law, for actions taken under the authority of a medical marijuana treatment center, provided he or she:
(a) Presents his or her registration card to any law enforcement official who questions the agent concerning their marijuana related activities; and
(b) Is acting in accordance with all the requirements of this law.
Section 6. Protection Against Forfeiture and Arrest
(A) The lawful possession, cultivation, transfer, transport, distribution, or manufacture of medical marijuana as authorized by this law shall not result in the forfeiture or seizure of any property.
(B) No person shall be arrested or prosecuted for any criminal offense solely for being in the presence of

medical marijuana or its use as authorized by this law.
Section 7. Limitations of Law
(A) Nothing in this law allows the operation of a motor vehicle, boat, or aircraft while under the influence of marijuana.
(B) Nothing in this law requires any health insurance provider, or any government agency or authority, to reimburse any person for the expenses of the medical use of marijuana.
(C) Nothing in this law requires any health care professional to authorize the use of medical marijuana for a patient.
(D) Nothing in this law requires any accommodation of any on-site medical use of marijuana in any place of employment, school bus or on school grounds, in any youth center, in any correctional facility, or of smoking medical marijuana in any public place.
(E) Nothing in this law supersedes Massachusetts law prohibiting the possession, cultivation, transport, distribution, or sale of marijuana for nonmedical purposes.
(F) Nothing in this law requires the violation of federal law or purports to give immunity under federal law.
(G) Nothing in this law poses an obstacle to federal enforcement of federal law.
Section 8. Department to define presumptive 60-day supply for qualifying patients.
Within 120 days of the effective date of this law, the department shall issue regulations defining the quantity of marijuana that could reasonably be presumed to be a sixty-day supply for qualifying patients, based on the best available evidence. This presumption as to quantity may be overcome with evidence of a particular qualifying patient's appropriate medical use.
Section 9. Registration of nonprofit medical marijuana treatment centers.
(A) Medical marijuana treatment centers shall register with the department.
(B) Not later than ninety days after receiving an application for a nonprofit medical marijuana treatment center, the department shall register the nonprofit medical marijuana treatment center to acquire, process, possess, transfer, transport, sell, distribute, dispense, and administer marijuana for medical use, and shall also issue a cultivation registration if:
1. The prospective nonprofit medical marijuana treatment center has submitted:
(a) An application fee in an amount to be determined by the department consistent with Section 13 of this law.
(b) An application, including:
(i) The legal name and physical address of the treatment center and the physical address of one additional location, if any, where marijuana will be cultivated.
(ii) The name, address and date of birth of each principal officer and board member.
(c) Operating procedures consistent with department rules for oversight, including cultivation and storage of marijuana only in enclosed, locked facilities.
2. None of the principal officers or board members has served as a principal officer or board member for a medical marijuana treatment center that has had its registration certificate revoked.
(C) In the first year after the effective date, the Department shall issue registrations for up to thirty-five non-profit medical marijuana treatment centers, provided that at least one treatment center shall be located in each county, and not more than five shall be located in any one county. In the event the Department determines in a future year that the number of treatment centers is insufficient to meet patient needs, the Department shall have the power to increase or modify the number of registered treatment centers.
(D) A medical treatment center registered under this section, and its dispensary agents registered under

Section 10, shall not be penalized or arrested under Massachusetts law for acquiring, possessing, cultivating, processing, transferring, transporting, selling, distributing, and dispensing marijuana, products containing marijuana, and related supplies and educational materials, to qualifying patients or their personal caregivers.

Section 10. Registration of medical treatment center dispensary agents.

(A) A dispensary agent shall be registered with the Department before volunteering or working at a medical marijuana treatment center.

(B) A treatment center must apply to the Department for a registration card for each affiliated dispensary agent by submitting the name, address and date of birth of the agent.

(C) A registered nonprofit medical marijuana treatment center shall notify the department within one business day if a dispensary agent ceases to be associated with the center, and the agent's registration card shall be immediately revoked.

(D) No one shall be a dispensary agent who has been convicted of a felony drug offense. The Department is authorized to conduct criminal record checks with the Department of Criminal Justice Information to enforce this provision.

Section 11. Hardship Cultivation Registrations.

The Department shall issue a cultivation registration to a qualifying patient whose access to a medical treatment center is limited by verified financial hardship, a physical incapacity to access reasonable transportation, or the lack of a treatment center within a reasonable distance of the patient's residence. The Department may deny a registration based on the provision of false information by the applicant. Such registration shall allow the patient or the patient's personal caregiver to cultivate a limited number of plants, sufficient to maintain a 60-day supply of marijuana, and shall require cultivation and storage only in an enclosed, locked facility. The department shall issue regulations consistent with this section within 120 days of the effective date of this law. Until the department issues such final regulations, the written recommendation of a qualifying patient's physician shall constitute a limited cultivation registration.

Section 12. Medical marijuana registration cards for qualifying patients and designated caregivers.

(A) A qualifying patient may apply to the department for a medical marijuana registration card by submitting

1. Written certification from a physician.

2. An application, including:

(a) Name, address unless homeless, and date of birth.

(b) Name, address and date of birth of the qualifying patient's personal caregiver, if any.

Section 13. Department implementation of Regulations and Fees.

Within 120 days of the effective date of this law, the department shall issue regulations for the implementation of Sections 9 through 12 of this Law. The department shall set application fees for non-profit medical marijuana treatment centers so as to defray the administrative costs of the medical marijuana program and thereby make this law revenue neutral.

Until the approval of final regulations, written certification by a physician shall constitute a registration card for a qualifying patient. Until the approval of final regulations, a certified mail return receipt showing compliance with Section 12 (A) (2) (b) above by a qualifying patient, and a photocopy of the application, shall constitute a registration card for that patient's personal caregiver.

Section 14. Penalties for Fraudulent Acts.

(A) The department, after a hearing, may revoke any registration card issued under this law for a willful violation of this law. The standard of proof for revocation shall be a preponderance of the evidence. A

revocation decision shall be reviewable in the Superior Court.
(B) The fraudulent use of a medical marijuana registration card or cultivation registration shall be a misdemeanor punishable by up to 6 months in the house of correction, or a fine up to $500, but if such fraudulent use is for the distribution, sale, or trafficking of marijuana for non-medical use for profit it shall be a felony punishable by up to 5 years in state prison or up to two and one half years in the house of correction.
Section 15. Confidentiality
The department shall maintain a confidential list of the persons issued medical marijuana registration cards. Individual names and other identifying information on the list shall be exempt from the provisions of Massachusetts Public Records Law, M.G.L. Chapter 66, section 10, and not subject to disclosure, except to employees of the department in the course of their official duties and to Massachusetts law enforcement officials when verifying a card holder's registration.
Section 16. Effective Date.
This law shall be effective January 1, 2013.
Section 17. Severability.
The provisions of this law are severable and if any clause, sentence, paragraph or section of this measure, or an application thereof, shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof but shall be confined in its operation to the clause, sentence, paragraph, section or application adjudged invalid.

ELECTION, 2012.

Article 114 of the Amendments to the Massachusetts Constitution

No otherwise qualified handicapped individual shall, solely by reason of his handicap, be excluded from the participation in, denied the benefits of, or be subject to discrimination under any program or activity within the commonwealth.

307 Mich.App. 340
Court of Appeals of Michigan.

BRASKA
v.
CHALLENGE MANUFACTURING CO.
Kemp
v.
Hayes Green Beach Memorial Hospital.
Kudzia
v.
Avasi Services, Inc.

Docket Nos. 313932, 315441, 318344.
|
Submitted Oct. 7, 2014, at Grand Rapids.
|
Decided Oct. 23, 2014, at 9:00 a.m.

Synopsis

Background: Three unemployment compensation claimants filed separate claims seeking benefits. The Michigan Compensation Appellate Commission (MCAC) determined that each claimant was disqualified from receiving benefits. Claimants appealed. The Circuit Court reversed each decision. The Department of Licensing and Regulatory Affairs, Unemployment Insurance Agency appealed.

[Holding:] After consolidating the appeals, the Court of Appeals held that claimants, who all had medical marijuana cards pursuant to the Michigan Medical Marijuana Act (MMMA) and were all discharged for failing a drug test as a result of having used marijuana, were not disqualified from receiving unemployment compensation benefits.

Affirmed.

Attorneys and Law Firms

****291** Legal Aid of Western Michigan, Grand Rapids, (by D. Scott Stuart) for Rick Braska.

Revision Legal, PLLC (by Eric W. Misterovich, St. Joseph), and Newburg Law, PLLC, Lansing (by Matthew R. Newburg), for Jenine Kemp.

Schwartz Law Firm, PC, Farmington Hills (by Mary A. Mahoney), for Stephen Kudzia.

Bill Schuette, Attorney General, Aaron D. Lindstrom, Solicitor General, Matthew Schneider, Chief Legal Counsel, and Susan Przekop–Shaw, Bradley A. Fowler, Peter Kotula, and Michael O. King, Jr., Assistant Attorneys General, for the Department of Licensing and Regulatory Affairs, Unemployment Insurance Agency.

Richard W. McHugh for the National Employment Law Project.

Steven M. Gray, Ann Arbor, for the Michigan Unemployment Insurance Project.

Daniel S. Korobkin, Michael J. Steinberg, and Kary L. Moss, Detroit, for the American Civil Liberties Union Fund of Michigan.

Before: BORRELLO, P.J., and SERVITTO and SHAPIRO, JJ.

Opinion

PER CURIAM.

***342** In these consolidated appeals, the Department of Licensing and Regulatory Affairs, Unemployment Insurance Agency (Department), appeals by leave granted circuit court orders holding that claimants were entitled to unemployment benefits. In Docket No. 313932, the Department appeals a November 9, 2012 Kent Circuit Court order reversing a decision of ***343** the Michigan Compensation Appellate Commission (MCAC) that claimant Rick Braska was disqualified from receiving unemployment benefits. In Docket No. 315441, the Department appeals a March 5, 2013 Ingham Circuit Court order reversing the decision of the MCAC that claimant Jenine Kemp was disqualified from receiving unemployment benefits. In Docket No. 318344, the Department appeals a September 5, 2013 Macomb Circuit Court order reversing the decision of the MCAC that claimant Stephen Kudzia was disqualified from receiving unemployment benefits. The common issue presented in the three cases is whether an employee who possesses a registration identification card under the Michigan Medical Marihuana Act (MMMA) MCL 333.26421 *et seq.*, is disqualified from receiving unemployment benefits under the Michigan Employment Security Act (MESA), MCL 421.1 *et seq.*, after the employee has been fired for failing to pass a drug test as a result of marijuana

use.[1] For the reasons set forth in this opinion, we affirm the circuit court rulings that claimants were entitled to unemployment benefits.

[1] Although the MMMA uses the spelling "marihuana," we use the more common spelling "marijuana" throughout this opinion. In addition, we will use the phrase "medical marijuana card" to refer to a "registration identification card."

I. BACKGROUND

A. *BRASKA V. CHALLENGE MANUFACTURING CO* (DOCKET NO. 313932)

Braska began working for Challenge Manufacturing Company (Challenge) as a material handler and hi-lo operator in September ****292** 2009. On June 11, 2010, Braska injured his ankle and was sent to a medical center where he was required to take a drug test. Braska ***344** tested positive for marijuana and disclosed for the first time that he had obtained a medical marijuana card in May 2010 and regularly used medical marijuana for his chronic back pain. Challenge terminated Braska's employment for violation of the company's drug-free-workplace policy as set forth in the employee handbook.

Dr. Richard Rasmussen, certified as a medical review officer for drug tests, reviewed the "results verification record," which was a printout of the laboratory results that was given to him. He signed the record on June 15, 2010. The results verification record showed that Braska tested positive for marijuana. There were 225 nanograms per milliliter of blood, which, according to Rasmussen, was "higher than the average." According to Rasmussen and Dr. David Crocker, there are no objective standards to determine when someone is under the influence of marijuana.

Following his termination, Braska applied for unemployment benefits. On July 6, 2010, the Unemployment Insurance Agency (UIA) found that Braska was not fired for a deliberate disregard of his employer's interest. It concluded that Braska was not disqualified for unemployment benefits under MCL 421.29(1)(b) for engaging in misconduct. Challenge protested the determination, and the UIA modified its decision, finding that Braska was discharged for testing positive for marijuana. Although failing a drug test would ordinarily have disqualified Braska from receiving benefits under MCL 421.29(1)(m), the UIA determined that because Braska had a valid medical marijuana card, he was not disqualified for unemployment benefits under that provision.

Challenge appealed the redetermination, and a hearing was held before an administrative law judge (ALJ). At the hearing, the ALJ excluded from evidence the ***345** results verification record, as well as a "specimen result certification" that Rasmussen sent to Challenge, because of problems in the chain of custody of Braska's urine sample. At the conclusion of the hearing, the ALJ found that Braska was fired for testing positive for marijuana, not general misconduct. The ALJ noted that an employer is required to establish, as a foundational element to the admission of the results of a drug test, that the sample analyzed was the sample collected from the employee. In this case, Challenge failed to produce any witness to establish how the drug test was conducted and how the sample test was handled. According to the ALJ, in the absence of this foundational testimony, the test results were inadmissible hearsay, and disqualification from unemployment benefits could not be established without them.

Recognizing that there might be disagreement on the adequacy of the evidence presented by Challenge, the ALJ addressed the effect of Braska's possession of a medical marijuana card. The ALJ noted that it surpassed credulity to believe that Braska had the card but did not use medical marijuana and that Braska specifically did not ask for a retest when one was offered by Rasmussen. The ALJ found that there was no evidence that Braska had operated a hi-lo under the influence of marijuana. Therefore, the ALJ concluded that Braska was not disqualified from receiving unemployment benefits under § 29(1)(m).

Challenge appealed the ALJ's decision to the MCAC, and the MCAC reversed. The MCAC concluded that the only question governing the admission of a document in an administrative hearing is ****293** whether reasonable people would rely on the document. It found that all the documents offered by Challenge were reliable. The MCAC noted that the ALJ allowed Braska to collect ***346** unemployment benefits because he possessed a medical marijuana card. The MCAC concluded that this amounted to error, given that Challenge only needed to present evidence that Braska had tested positive on a drug test that was administered in a nondiscriminatory manner to disqualify Braska from receiving benefits. It ruled that the preponderance of the evidence established that Braska

was disqualified from receiving benefits under § 29(1)(m).

Braska appealed the MCAC's decision in the circuit court, and the circuit court reversed on the ground that the MCAC's decision was not supported by competent, material, and substantial evidence. The court noted that the MCAC had failed to address the ALJ's interpretation and application of the MMMA and MESA, but the court declined to address those issues. This Court granted the Department's application for leave to appeal the circuit court's order.

B. *KEMP V. HAYES GREEN BEACH MEMORIAL HOSPITAL* (DOCKET NO. 315441)

Kemp worked for Hayes Green Memorial Hospital (HGB) as a CT technician. HGB had a zero-tolerance drug policy. Employees were tested for drugs upon hire and then upon reasonable suspicion. In May 2011, a patient complained about Kemp, claiming that Kemp had inserted an IV line in the patient without using gloves, discussed the patient's insurance coverage in a crowded area, and told the patient about her family's drug use, including that she ate "special brownies."

On June 2, 2011, following an investigation into the complaint, Jennifer Myers, the human resource manager for HGB, told Kemp that she needed to take a drug test. Kemp consented, and she wrote on the consent form that she used marijuana for medical reasons. At ***347** the meeting, Kemp showed no objective signs of intoxication. Kemp tested positive for marijuana and delta–9–tetrahydrocannabinol (THC). A second test confirmed the results. On June 8, 2011, Myers informed Kemp that she was terminated. The reason for the termination was the failed drug test.

Kemp suffered from lupus, neuropathy, and chronic pain in her hand. She obtained a medical marijuana card in December 2010 and it remained valid in May 2011, when she was terminated. According to Kemp, she was never under the influence of marijuana at work. She used marijuana between 6:00 p.m. and 7:00 p.m., and the effects were usually gone within two hours. Her shift at HGB was from 6:30 a.m. to 3:00 p.m.

Following her termination, Kemp applied for unemployment benefits. The UIA initially determined that, because Kemp was terminated for testing positive for an illegal substance, she was disqualified from receiving benefits under § 29(1)(m). The UIA reversed its decision after Kemp provided documentation that she possessed a medical marijuana card. HGB protested, and a hearing was held before an ALJ. The ALJ affirmed the UIA's redetermination that Kemp was not disqualified from receiving unemployment benefits. The ALJ explained that because marijuana was legally available to use for medical purposes, the issue whether Kemp's use of marijuana constituted misconduct or was illegal must include consideration of the MMMA. Because Kemp used marijuana for medical purposes, her use was lawful and, therefore, could not bar her receipt of benefits.

****294** HGB appealed, and the MCAC reversed the ALJ's decision. The MCAC concluded that Kemp was disqualified from receiving unemployment benefits under § 29(1)(m). It reasoned that the MMMA only allows ***348** possession and consumption of marijuana; it does not regulate private employment or offer employment protection.

Kemp appealed in the Ingham Circuit Court, and the circuit court reversed the MCAC's decision. The circuit court noted that, although a federal court held that the MMMA did not prohibit a private employer from firing an employee who used medical marijuana, the present case involved state action. MESA, and specifically § 29, is enforced and interpreted by a state agency. Because there was state action, the MMMA was applicable and needed to be considered in determining whether Kemp was disqualified from receiving unemployment benefits. According to the circuit court, an employee who uses medical marijuana but is not intoxicated at work is not disqualified from receiving benefits under § 29(1)(m). It noted that the benefit interpretation by the UIA provided that an employee who uses medical marijuana should not be disqualified from benefits unless the employee is in possession of marijuana at work, is under the influence at work, or uses it at work. Specifically, regarding Kemp, the circuit court stated that Kemp did not fall under any of the three categories and that there was no evidence that she used medical marijuana other than as allowed by the MMMA. According to the circuit court, any disqualification from unemployment benefits would amount to a forfeiture of benefits that Kemp was otherwise qualified to receive, which constituted an impermissible penalty under the MMMA.

In reaching its conclusion, the circuit court rejected the Department's argument that Kemp tested positive for marijuana at work and that her discharge was akin to testing positive for any other intoxicating or illegal substance, such as Vicodin. It noted that the record did ***349** not show that Kemp tested positive for active marijuana. Rather, she tested positive for a metabolite of

marijuana known as 11–carboxy–THC, which is not a Schedule 1 controlled substance and has no pharmacological effect on the body. Thus, according to the circuit court, the drug test simply demonstrated what Kemp had informed HGB of before the test—she used medical marijuana. This Court granted the Department's application for leave to appeal the circuit court's order.

C. *KUDZIA V. AVASI SERVICES INC* (DOCKET NO. 318344)

Kudzia worked as an in-home service technician for Avasi Services, a corporate subsidiary of Art Van Furniture, Inc., whose employees repaired furniture for Art Van customers. Art Van required its employees to be drug-free, and it subjected the employees who drove an Art Van vehicle to random drug tests. On June 21, 2012, Daryl Smith, the service manager for Avasi Services, advised Kudzia that he had to report for a random drug test. Kudzia, who showed no signs of intoxication, said nothing in response. According to Dr. Stuart Hoffman, a medical review officer, Kudzia tested positive for "metabolized marijuana." On June 27, 2012, Smith met with Kudzia and informed him that he was discharged because of the failed test. Kudzia did not dispute the test results, and he informed Smith that he had a medical marijuana card.

In the past, Kudzia had undergone two surgeries on his knees. In July 2010, he received a medical marijuana card, which was valid through July 2012. After he received the card, Kudzia used a marijuana-infused cream on his knees.

****295** The UIA found that Kudzia was discharged for testing positive on a drug test. It determined that he was not disqualified from receiving benefits under ***350** § 29(1)(m). Avasi Services appealed, and a hearing was held before an ALJ. The ALJ ruled that Kudzia was disqualified from receiving benefits under § 29(1)(b) (misconduct). The ALJ explained that no law prohibited an employer from having a policy that prohibited the use or possession of controlled substances. Kudzia acted in direct contravention of his employer's policy, as he did not request an exemption to use medical marijuana. However, the hearing referee also concluded that Kudzia was not disqualified from receiving benefits under § 29(1)(m). There was no evidence that Kudzia used medical marijuana in contravention of the MMMA.

Kudzia appealed, and the MCAC affirmed the ALJ's decision on different grounds. It reasoned that an employee who tests positive for a controlled substance is disqualified from receiving benefits under § 29(1)(m). Kudzia appealed the MCAC's decision in the Macomb Circuit Court, and the circuit court reversed. First, the circuit court ruled that, to the extent that provisions of the MMMA and MESA conflicted, the MMMA controlled. Second, it held that, although the MMMA does not impose restrictions on private employers, the MMMA applies to state action and the MCAC's decision to deny Kudzia benefits was an action by the state. The circuit court then held that Kudzia's use of medical marijuana implicated § 29(1)(m) because the MMMA did not legalize the use of marijuana. Nonetheless, the circuit court determined that the disqualification from benefits was contrary to the MMMA because it was a penalty or the denial of a right or privilege for the medical use of marijuana. The circuit court rejected the Department's argument that Kudzia's behavior was impermissible under the MMMA. It explained that Kudzia tested positive for marijuana metabolites and that it did not follow, from the presence of the metabolites, that Kudzia had ingested marijuana in the workplace or that he was under the influence of marijuana ***351** during work hours. This Court granted the Department's application for leave to appeal the circuit court's order.

II. STANDARD OF REVIEW

The issue whether unemployment benefits may be denied to an individual who, after using marijuana in accordance with the MMMA, is discharged after testing positive on a drug test was raised before the circuit courts in all three cases. The issue was decided by the circuit courts in the Kemp case and the Kudzia case and is therefore is preserved in those two cases. *King v. Oakland Co. Prosecutor*, 303 Mich.App. 222, 239, 842 N.W.2d 403 (2013). Although the issue was not decided by the circuit court in the Braska case, the issue involves an issue of statutory interpretation, the facts necessary for its resolution are present, and it is dispositive of the appeal; therefore we will address the issue in all three cases. See *State Treasurer v. Snyder*, 294 Mich.App. 641, 644, 823 N.W.2d 284 (2011).

A decision by the MCAC is subject to review by a circuit court under MCL 421.38, which provides in relevant part as follows:

> The circuit court ... may review questions of fact and law on the record made before the administrative law judge and the

> [MCAC] involved in a final order or decision of the [MCAC], and may make further orders in respect to that order or decision as justice may require, but the court may reverse an order or decision only if it finds that the order or decision is contrary to law or is not supported by competent, material, ****296** and substantial evidence on the whole record.

[1] [2] "This Court reviews a lower court's review of an administrative decision to determine whether the lower court applied correct legal principles and whether it misapprehended or misapplied the substantial evidence test ***352** to the agency's factual findings," which is essentially a clear-error standard of review. *VanZandt v. State Employees' Retirement Sys.,* 266 Mich.App. 579, 585, 701 N.W.2d 214 (2005). In other words, the circuit court's legal conclusions are reviewed de novo and its factual findings are reviewed for clear error. *Mericka v. Dep't of Community Health,* 283 Mich.App. 29, 36, 770 N.W.2d 24 (2009).

[3] [4] [5] These appeals involve issues of statutory interpretation, which are questions of law that we review de novo. *Id.* "The primary goal of statutory interpretation is to ascertain and give effect to the Legislature's intent as expressed by the language of the statute." *Id.* at 38, 770 N.W.2d 24. If the statutory language is clear and unambiguous, judicial construction is neither required nor permitted; the statute must be enforced as written. *Michigan v. McQueen,* 493 Mich. 135, 147, 828 N.W.2d 644 (2013). Regarding voter-initiated statutes such as the MMMA, the intent of the electors governs the interpretation of the statute. *Id.* The statute's plain language is the most reliable evidence of the electors' intent. *Id.*

III. ANALYSIS

A. MESA

When it enacted MESA, the Legislature declared that "[e]conomic insecurity due to unemployment is a serious menace" and that "[t]he systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment by the setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own ... is for the public good, and the general welfare of the people of this state." MCL 421.2(1).

An individual must be eligible to receive unemployment benefits under MESA. Initially, an individual must meet ***353** certain threshold requirements set forth in MCL 421.28 such as, among other things, filing a claim for benefits and seeking employment. See MCL 421.28(1)(a), (b), and (c). In the event an individual meets the threshold requirements of § 28, he or she may nevertheless be disqualified from receiving benefits under MCL 421.29, which provides in pertinent part as follows:

> (1) Except as provided in subsection (5), an individual is disqualified from receiving benefits if he or she:
>
> * * *
>
> (b) Was suspended or discharged for misconduct connected with the individual's work or for intoxication while at work.
>
> * * *
>
> (m) Was discharged for illegally ingesting, injecting, inhaling, or possessing a controlled substance on the premises of the employer; refusing to submit to a drug test that was required to be administered in a nondiscriminatory manner; or testing positive on a drug test, if the test was administered in a nondiscriminatory manner....
>
> (*i*) "Controlled substance" means that term as defined in section 7104 of the public health code, 1978 PA 368, MCL 333.7104.[2]
>
> 2 A "controlled substance" is defined in MCL 333.7104(2) as "a drug, substance, or immediate precursor included in schedules 1 to 5 of part 72 [MCL 333.7201 *et seq.*]."
>
> ****297** (*ii*) "Drug test" means a test designed to detect the illegal use of a controlled substance. [Emphasis added.]

B. THE MMMA

[6] [7] The MMMA was approved by the state electors in November 2008. ***354** *People v. Kolanek,* 491 Mich. 382, 393, 817 N.W.2d 528 (2012). In approving the MMMA,

the state electors found that, according to modern medical research, there were beneficial uses for marijuana in treating or alleviating the effects of a variety of debilitating medical conditions. MCL 333.26422 (a). "The purpose of the MMMA is to allow a limited class of individuals the medical use of marijuana...." *Kolanek,* 491 Mich. at 393, 817 N.W.2d 528. However, the MMMA did not legalize the use or possession of marijuana in all contexts. *People v. Koon,* 494 Mich. 1, 5, 832 N.W.2d 724 (2013). Marijuana remains a Schedule 1 controlled substance. *Id.*[3] "The MMMA does *not* create a general right for individuals to use and possess marijuana in Michigan. Possession, manufacture, and delivery of marijuana remain punishable offenses under Michigan law." *Kolanek,* 491 Mich. at 394, 817 N.W.2d 528. See also *Ter Beek v. Wyoming,* 495 Mich. 1, 15, 846 N.W.2d 531 (2014) ("[I]ts possession, manufacture, and delivery remain punishable offenses under Michigan law.").

3 Marijuana is listed as a Schedule 1 controlled substance under the Public Health Code, MCL 333.1101 *et seq.* MCL 333.7212(1)(c). In 2013, the Legislature amended MCL 333.7212, adding § 2, which reclassified marijuana as a Schedule 2 controlled substance "if it is manufactured, obtained, stored, dispensed, possessed, grown, or disposed of in compliance with this act and as authorized by federal authority." 2013 PA 268. MCL 333.7214, the list of Schedule 2 controlled substances was also amended by 2013 PA 268, and it now provides that marijuana is a Schedule 2 controlled substance "but only for the purpose of treating a debilitating medical condition as that term is defined in [the MMMA], and as authorized under this act." MCL 333.7214(e). Marijuana remains listed as a Schedule 1 controlled substance under federal law. 21 USC 812(c), Schedule I(c)(10).

[8] The MMMA functions by granting immunity from arrest, prosecution, or penalty. *Koon,* 494 Mich. at 5, 832 N.W.2d 724. Section 4 of the MMMA provides, in pertinent part:

> A qualifying patient who has been issued and possesses a registry identification card *shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right* ***355** *or privilege,* including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of marihuana in accordance with this act.... [MCL 333.26424(a) (emphasis added).] [4]

4 The MMMA also grants a "patient" an affirmative defense, under certain circumstances, to any prosecution involving marijuana. MCL 333.26428.

The MMMA's immunity applies only if marijuana is used in accordance with the provisions of the MMMA. MCL 333.26427(a). The MMMA does not permit any person to "[u]ndertake any task under the influence of marihuana, when doing so would constitute negligence or professional malpractice" or to "[o]perate, navigate, or be in actual physical control of any motor vehicle, aircraft, or motorboat while under the influence of marihuana." MCL 333.26427(b)(1), (4). In addition, nothing in the MMMA may be construed to require an "employer to accommodate the ingestion of marihuana in any workplace ****298** or any employee working while under the influence of marihuana." MCL 333.26427(c)(2).

[9] The MMMA also contains a broadly worded provision to ensure that qualifying individuals who adhere to the terms of the MMMA do not suffer penalties for their use of marijuana for medicinal purposes. Specifically, MCL 333.26427(e) provides "[a]ll other acts and parts of acts inconsistent with this act do not apply to the medical use of marihuana as provided for by this act." Thus, to the extent another law would penalize an individual for using medical marijuana in accordance with the MMMA, that law is superseded by the MMMA. *Koon,* 494 Mich. at 8–9, 832 N.W.2d 724.

C. APPLICATION

[10] The central issue presented in these three appeals is whether an employee who has a medical marijuana card ***356** and is discharged after failing a drug test may be denied unemployment benefits. To resolve this issue, we must examine the interplay between MESA and the MMMA. Specifically, we must first determine (1) whether claimants met the threshold requirements for unemployment compensation under MESA, (2) whether claimants were nevertheless disqualified from receiving benefits under one of MESA's disqualification provisions, and (3), to the extent claimants were disqualified for testing positive for marijuana, whether the MMMA nevertheless provides immunity and supersedes MESA in this respect.

With respect to MESA, none of the parties disputes that claimants met the threshold requirements for unemployment benefits under MCL 421.28. The MCAC found claimants disqualified for benefits under § 29(1)(m). As set forth earlier, that statutory provision disqualifies an individual who was discharged for the following conduct: (1) "illegally ingesting, injecting, inhaling or possessing a controlled substance on the premises of the employer," (2) refusing to submit to a fairly administered drug test, and (3) for "testing positive on a drug test, if the test was administered in a nondiscriminatory manner." MCL 421.29(1)(m). There is no evidence in the record that any of the three claimants ingested, injected, inhaled, or possessed marijuana on the premises of their respective employers. Furthermore, claimants' employers did not allege that claimants were under the influence of marijuana at any time during work hours. Similarly, claimants did not refuse to submit to a drug test. Thus, the first two disqualifiers under § 29(1)(m) are inapplicable in the present cases.

With respect to the third disqualifier, the MCAC determined that claimants were disqualified under that ***357** provision because they failed a drug test. However, although claimants failed their respective drug tests and ordinarily would have been disqualified for unemployment benefits under § 29(1)(m), we must determine whether claimants were nevertheless entitled to unemployment benefits under the MMMA provisions that grant immunity and supersede contrary laws.[5]

[5] Claimants present several arguments concerning the results of the drug tests. Braska argues that the MCAC erred by admitting the results verification record and the specimen result certificate. Braska and Kemp argue that individuals are not disqualified under § 29(1)(m) simply for testing positive on a drug test. According to them, based on the definition of a "drug test," an individual is only disqualified if the positive drug test was the result of the "illegal use" of a drug. Finally, Kudzia argues that he only tested positive for marijuana "metabolites," and the circuit court stated that Kemp tested positive for 11–carboxy–THC without explaining the import of that statement. We need not address the merits of these arguments. Even assuming that claimants tested positive for marijuana and results of those tests were properly admitted during the administrative proceedings, because there was no evidence that the positive drug tests were a result of anything other than the medical use of marijuana in accordance with the terms of the MMMA, denial of the unemployment benefits constituted a penalty that ran afoul of the MMMA's immunity clause. Therefore, claimants' arguments are moot.

****299** As noted, the MMMA's immunity clause provides in relevant part as follows:

> A qualifying patient who has been issued and possesses a registry identification card *shall not be subject to* arrest, prosecution, or *penalty in any manner, or denied any right or privilege,* including but not limited to *civil penalty or disciplinary action* by a business or occupational or professional licensing board or bureau, for the medical use of marihuana in accordance with this act.... [MCL 333.26424(a) (emphasis added).]

The immunity provided under this section is broad. It prohibits the imposition of certain consequences on individuals who use medical marijuana in accordance with the MMMA. See ***358** *1031 Lapeer LLC v. Rice*, 290 Mich.App. 225, 231, 810 N.W.2d 293 (2010) (use of the phrase "shall not" designates a mandatory prohibition). Specifically, the statute provides that qualifying patients "shall not" (1) "be subject to arrest, prosecution, or penalty in any manner" or (2) be denied any "right" or "privilege," "*including but not limited to* civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau...." (Emphasis added).

In this case, none of the parties contends that claimants used medical marijuana in a manner that did not comply with the terms of the MMMA. Therefore, we must determine whether denial of unemployment benefits constitutes either imposition of a penalty or denial of a right or privilege.

The MMMA does not define the term "penalty." In *Ter Beek*, 495 Mich. at 20, 846 N.W.2d 531, in the context of the MMMA, our Supreme Court referred to a dictionary to define the term to mean "a 'punishment imposed or incurred for a violation of law or rule ... something forfeited.' " *Id.*, quoting *Random House Webster's College Dictionary* (2000). Further, because the term "penalty" in MCL 333.26424(a) is modified by the phrase "in any manner," the immunity granted by the MMMA from penalties "is to be given the broadest application" and applies to both civil and criminal penalties. *Ter Beek v. Wyoming*, 297 Mich.App. 446, 455, 823 N.W.2d 864 (2012), aff'd 495 Mich. 1, 846 N.W.2d 531 (2014).

Applying this definition to the present case, we conclude that denial of unemployment benefits under § 29(1)(m)

constitutes a "penalty" under the MMMA that was imposed upon claimants for their medical use of marijuana. As discussed earlier, none of the parties disputes that claimants met the threshold requirements for unemployment benefits under MCL 421.28. The only reason claimants were disqualified by the MCAC ***359** from receiving benefits was because they tested positive for marijuana. In other words, absent their medical use of marijuana—and there was no evidence that claimants, all of whom possessed a medical marijuana card, failed to abide by the MMMA's provisions in their use—claimants would not have been disqualified under § 29(1)(m). Thus, because claimants used medical marijuana, they were required to forfeit their unemployment benefits. For this reason, the decision by the MCAC to deny claimants unemployment benefits amounted to a penalty imposed for the medical ****300** use of marijuana contrary to MCL 333.26424(a). Accordingly, because the MMMA supersedes MESA in this respect, the MCAC erred by denying claimants unemployment benefits. See MCL 333.26427(e) ("All other acts and parts of acts inconsistent with [the MMMA] do not apply to the medical use of marihuana as provided for by this act.").

The Department argues that disqualification under § 29(1)(m) is not a "penalty." According to the Department, something cannot be forfeited unless one was entitled to it, and claimants were not entitled to unemployment benefits because MESA conditions the payment of benefits upon an individual's eligibility and qualification. We reject the Department's argument that, because claimants were disqualified under § 29(1)(m), they were not penalized. This argument ignores the salient fact that claimants met the threshold requirements for unemployment benefits and were disqualified only because of their use of medical marijuana.

In addition, the Department claims that, to the extent the denial of unemployment benefits constituted a penalty, the penalty was imposed not for the medical use of marijuana, but rather for failing a drug test. ***360** Essentially, the Department contends that we should distinguish the act of failing a drug test from claimants' medical use of marijuana. We decline the Department's invitation to ignore the basis for the positive drug tests and engage in linguistic gymnastics in an attempt to avoid the plain language of the MMMA. Claimants' use of medical marijuana and their subsequent positive drug tests are inextricably intertwined. Each claimant tested positive for marijuana. There was no dispute that each claimant possessed a medical marijuana card. No evidence was presented to suggest that the marijuana discovered in the drug tests was not from the medical use of marijuana or that claimants failed to use medical marijuana in accordance with the provisions of the MMMA. Stated simply, claimants would not have failed the drug test had they not used medical marijuana. The plain language of the MMMA's immunity clause states that claimants "*shall not* " suffer a penalty for their medical use of marijuana. In construing unambiguous language such as this, we will give the statutory words their plain meaning. See *Scalise v. Boy Scouts of America*, 265 Mich.App. 1, 26, 692 N.W.2d 858 (2005) ("When construing a statute, where the language is unambiguous, this Court gives the words their plain meaning."). But for claimants' use of medical marijuana, the MCAC would not have disqualified them for unemployment benefits. The disqualification clearly amounted to a penalty imposed on claimants for their medical use of marijuana that ran afoul of the MMMA's immunity clause. Because the MMMA supersedes conflicting provisions of MESA, the MCAC erred by concluding that claimants were disqualified for unemployment benefits.[6]

[6] Because we conclude that the denial of unemployment benefits constituted a "penalty," we need not address whether unemployment benefits constitute a "right" or a "privilege" for purposes of the MMMA.

***361** The Department also argues that if we were to hold that the MMMA protects against the denial of unemployment benefits, we would disregard the MMMA's provision that employers are not required to accommodate the use of medical marijuana in the workplace. However, the Department reads the relevant provision of the MMMA, MCL 333.26427(c)(2), too broadly. The provision does not state that an employer is not required to accommodate the *medical use* of marijuana, which includes internal possession, MCL 333.26423(f). ****301** Rather, it states that nothing in the MMMA shall be construed to require "[a]n employer to accommodate the *ingestion* of marihuana *in any workplace* or any employee *working while under the influence* of marihuana." MCL 333.26427(c)(2) (emphasis added). There was no evidence that claimants ingested marijuana in the workplace or that they worked under the influence of marijuana. Thus, the Department's argument with respect to MCL 333.26427(c)(2) is misplaced.

In a related argument, the Department contends that awarding unemployment benefits in this case amounts to a penalty imposed on the employers because the employers ultimately will be required to pay increased contributions to the unemployment compensation fund. However, to the extent that applying the plain language of the MMMA results in employers being responsible for

paying unemployment benefits, that is a matter of public policy. Our authority does not extend to setting public policy for the state. *Houston v. Governor,* 491 Mich. 876, 877, 810 N.W.2d 255 (2012). Rather, our concern is the plain language of the statute, which is the best indicator of the intent of the electorate in approving the medical marijuana initiative. *McQueen,* 493 Mich. at 147, 828 N.W.2d 644. Here, ***362** as discussed earlier, the denial of unemployment benefits conflicts with the plain language of the MMMA's immunity clause.

The Department cites *Casias v. Wal–Mart Stores, Inc.,* 695 F.3d 428 (C.A.6, 2012), and *Beinor v. Indus. Claim Appeals Office of Colorado,* 262 P.3d 970 (Colo.App., 2011), to further support its argument that the MMMA does not apply to private employers. The Department's reliance on these cases is unpersuasive.

In *Casias,* the Sixth Circuit Court of Appeals held that the MMMA's immunity clause did not apply to a private employer's decision to fire an employee for using medical marijuana, reasoning that the MMMA does not impose restrictions on private employers. *Id.* at 435. The *Casias* decision is not binding precedent on this Court. See *Mettler Walloon, LLC v. Melrose Twp.,* 281 Mich.App. 184, 221 n. 6, 761 N.W.2d 293 (2008) (noting that, "[o]n questions of state law, Michigan courts are not bound by foreign authority"). Moreover, unlike in *Casias,* we are not presented with the issue of whether the MMMA's immunity clause applies in cases involving action solely by private employers.[7] The issue ***363** raised in these cases is not whether the employers violated the MMMA because they terminated claimants. The issue is whether, by denying unemployment benefits, the MCAC—a state actor—imposed a penalty on claimants that ran afoul of the MMMA's broad immunity clause. When an individual is denied unemployment benefits, the employer's conduct is not at issue; rather, the denial involves state action. See ****302** *Vander Laan v. Mulder,* 178 Mich.App. 172, 176, 443 N.W.2d 491 (1989).

[7] In addressing whether the MMMA's immunity clause applied to private employers, the Sixth Circuit interpreted the phrase "*including but not limited to* civil penalty or disciplinary action *by a business or occupational or professional licensing board or bureau* " to be limited in scope to state actors—i.e., business, occupational, or professional licensing boards or bureaus. See *Casias,* 695 F.3d at 436. Notably, the Sixth Circuit did not discuss in any detail the significance of the phrase "*included but not limited to* " in determining that the MMMA was limited to business, occupational, or professional licensing boards or bureaus. See *id.* at 435–437. However, as noted, we are not tasked with deciding whether the MMMA applies in situations involving solely a private actor when denial of unemployment benefits involves action by the MCAC, a state actor. See *Vander Laan v. Mulder,* 178 Mich.App. 172, 176, 443 N.W.2d 491 (1989) (noting that when an individual is denied unemployment benefits, the employer's conduct is not at issue).

Similarly, *Beinor,* 262 P.3d at 975, is neither binding on this Court, *Mettler Walloon,* 281 Mich.App. at 221 n. 6, 761 N.W.2d 293, nor is it persuasive. In *Beinor,* the Colorado Court of Appeals held that the plaintiff, a medical marijuana user, was not entitled to unemployment benefits after he was terminated for failing a drug test. The court reasoned that the plaintiff was not entitled to immunity under the provision of Colorado's constitution allowing the medical use of marijuana. *Id.* at 975–976. The reasoning in *Beinor* is not persuasive for purposes of these cases. The constitutional provision at issue in that case only protected medical marijuana users from the state's criminal laws, *id.* at 975, whereas the MMMA's immunity clause is much broader, extending to both criminal and civil penalties. See *Ter Beek,* 495 Mich. at 20–21, 846 N.W.2d 531. Therefore, we do not find *Beinor* helpful to our analysis in these cases.

Finally, the Department argues that even if the MMMA prevents claimants from being disqualified from receiving unemployment benefits under § 29(1)(m), they are still disqualified from receiving benefits under § 29(1)(b) of MESA. Under that provision, an individual is disqualified from receiving benefits if he or she was discharged for misconduct connected with the individual's work. MCL 421.29(1)(b). ***364** According to the Department, all three claimants engaged in misconduct because they acted in direct and knowing contravention of their employers' zero-tolerance drug policies.

[11] Contrary to the Department's argument, § 29(1)(b) is not applicable in the present cases. "[I]t is a settled rule of statutory construction that where a statute contains a specific statutory provision and a related, but more general, provision, the specific one controls." *In re Haley,* 476 Mich. 180, 198, 720 N.W.2d 246 (2006). In these cases, the MCAC found that each claimant was discharged for testing positive on a drug test. Other than testing positive for marijuana, there was no misconduct that led to any claimant being discharged. MCL 421.29 contains a specific provision regarding disqualification when an individual tests positive on a drug test. Accordingly, under the settled rule of statutory interpretation set forth in *In re Haley,* claimants' disqualification from receiving unemployment benefits is

governed by § 29(1)(m), the specific provision concerning testing positive on a drug test, rather than § 29(1)(b), a related, but more general, provision regarding misconduct.

In addition, even if § 29(1)(b) were applicable and the MCAC disqualified claimants from receiving unemployment benefits because they were discharged for misconduct, this would not affect our analysis with respect to the plain language of the MMMA's immunity clause. Claimants' misconduct involved testing positive for marijuana on a drug test, which violated their employers' zero-tolerance drug policies. However, the only reason that claimants tested positive on the drug tests was that they used medical marijuana. Absent their use of medical marijuana, claimants would not have been disqualified from receiving unemployment benefits. ***365** Thus, the denial of benefits as a result of disqualification under § 29(1)(b), like disqualification under § 29(1)(m), results in a "penalty in any manner" for the medical use of marijuana contrary to MCL 333.26424(a).

IV. CONCLUSION

Claimants tested positive for marijuana and would ordinarily have been disqualified for unemployment benefits under MESA, MCL 421.29(1)(m); however, because ****303** there was no evidence to suggest that the positive drug tests were caused by anything other than claimants' use of medical marijuana in accordance with the terms of the MMMA, the denial of the benefits constituted an improper penalty for the medical use of marijuana under the MMMA, MCL 333.26424(a). Because the MMMA supersedes conflicting provisions of MESA, the circuit courts did not err by reversing the MCAC's rulings that claimants were not entitled to unemployment compensation benefits.[8]

8 To the extent the circuit court in Docket No. 313932 erred by applying the incorrect standard of review, we affirm because the court reached the right result. See *Gleason v. Mich. Dep't of Transportation,* 256 Mich.App. 1, 3, 662 N.W.2d 822 (2003) ("A trial court's ruling may be upheld on appeal where the right result issued, albeit for the wrong reason.").

Affirmed. A public question being involved, no costs awarded. MCR 7.219(A). We do not retain jurisdiction.

BORRELLO, P.J., and SERVITTO and SHAPIRO, JJ., concurred.

All Citations

307 Mich.App. 340, 861 N.W.2d 289, Unempl.Ins.Rep. (CCH) P 10,292

End of Document

West's Ann.Cal.Health & Safety Code § 11362.5

§ 11362.5. Medical use

Currentness

(a) This section shall be known and may be cited as the Compassionate Use Act of 1996.

(b)(1) The people of the State of California hereby find and declare that the purposes of the Compassionate Use Act of 1996 are as follows:

(A) To ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief.

(B) To ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction.

(C) To encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana.

(2) Nothing in this section shall be construed to supersede legislation prohibiting persons from engaging in conduct that endangers others, nor to condone the diversion of marijuana for nonmedical purposes.

(c) Notwithstanding any other provision of law, no physician in this state shall be punished, or denied any right or privilege, for having recommended marijuana to a patient for medical purposes.

(d) Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician.

(e) For the purposes of this section, "primary caregiver" means the individual designated by the person exempted under this section who has consistently assumed responsibility for the housing, health, or safety of that person.

Credits

(Added by Initiative Measure (Prop. 215, § 1, approved Nov. 5, 1996).)

Notes of Decisions (279)

West's Ann. Cal. Health & Safety Code § 11362.5, CA HLTH & S § 11362.5
Current with all 2016 Reg.Sess. laws, Ch. 8 of 2015-2016 2nd Ex.Sess., and all propositions on 2016 ballot.

End of Document

764 F.Supp.2d 914
United States District Court,
W.D. Michigan,
Southern Division.

Joseph CASIAS, Plaintiff,
v.
WAL–MART STORES, INC., and Troy Estill,
Defendants.

Case No. 1:10–CV–781.
|
Feb. 11, 2011.

Synopsis
Background: Former employee sued former employer and individual store manager, claiming wrongful discharge in connection with his termination after he tested positive for marijuana. Defendants removed the action from state court. Employee moved to remand, and defendants moved to dismiss.

Holdings: The District Court, Robert J. Jonker, J., held that:

[1] manager could not be held liable and was fraudulently joined, and

[2] Michigan Medical Marihuana Act (MMMA) did not regulate private employment, thus defeating the employee's wrongful discharge claim.

Defendants' motion granted.

Attorneys and Law Firms

***915** Daniel W. Grow, Daniel W. Grow PLLC, St. Joseph, MI, Daniel Stewart Korobkin, Michael J. Steinberg, Aclu Fund of Michigan, Detroit, MI, Scott Matthew Michelman, Aclu Foundation, Santa Cruz, CA, for Plaintiff.

Kelly Ann Petrocelli, Barnes & Thornburg LLP, Grand Rapids, MI, Michael P. Palmer, Barnes & Thornburg LLP, South Bend, IN, Susan McCaffery Zoeller, Barnes & Thornburg LLP, Indianapolis, IN, for Defendants.

OPINION AND ORDER

ROBERT J. JONKER, District Judge.

Plaintiff Joseph Casias used to work as an at-will employee for a Wal–Mart store in Battle Creek, Michigan. The company fired him under its drug use policy after he tested positive for marijuana. Mr. Casias sued Wal–Mart Stores East, L.P.[1] in state court for wrongful discharge, claiming that Wal–Mart's application of its drug use policy to him violated the Michigan Medical Marihuana Act ("MMMA").[2] Plaintiff joined Troy Estill, the individual store manager, as a defendant in the case. Defendant Estill, like Plaintiff Casias, is a Michigan resident, and if Defendant Estill is a proper defendant, there is no diversity jurisdiction here. The defendants removed the matter to this Court and claim ***916** Defendant Estill needs to be disregarded in the diversity calculus. Mr. Casias moves to remand the matter back to the state court. The defendants move to dismiss the case for failure to state a claim. To rule on these motions, the Court must determine whether it has jurisdiction, and if so, whether the MMMA—whatever else it may do—eliminates the normal rule of at-will employment and creates a new protected class for certain marijuana users in Michigan.

1 The parties stipulate that the properly named company defendant in this action is Wal–Mart Stores East, L.P. (Docket # 35.) The Court will refer to this defendant throughout the opinion simply as Wal–Mart.

2 The Court uses the more common spelling of marijuana, although the Michigan statute uses a different spelling.

FACTS

Joseph Casias, a resident of Battle Creek, Michigan, worked in a variety of positions at a Wal–Mart store in Battle Creek from 2004 until 2009. (Def. Notice of Removal, Docket # 1, Ex. A2, Complaint ¶¶ 14, 22–23.) Troy Estill, also a citizen of Michigan, managed the store during the period in question. (Docket # 1, Ex. B, Estill Decl. ¶ 5.) Mr. Casias was by all accounts a good employee. Wal–Mart promoted him to inventory control

manager after three and a half years and named him "associate of the year" in 2008. (Compl., ¶¶ 2, 23.) The relationship between Wal–Mart and Mr. Casias was that of a normal employer and employee in Michigan. Nothing in the record indicates that Mr. Casias entered into a particular employment contract with Wal–Mart that guaranteed additional protections beyond those provided under Michigan law.

During Mr. Casias's employment, Wal–Mart had a drug use policy for employees. The policy required testing in some situations. Wal–Mart required Mr. Casias to take a drug test when it hired him in 2004, and Mr. Casias passed. (Compl., ¶ 22.) In accordance with its policy, Wal–Mart tested Mr. Casias again in November 2009 after Mr. Casias was injured while at work. (*Id.*, ¶ 37.) The record indicates that drug testing after a workplace injury was mandatory and not left to the discretion of a particular store manager or supervisor. Consistent with its policy, Wal–Mart tested Mr. Casias for numerous drugs, including but not limited to marijuana. (*Id.*, ¶¶ 37–38.) Mr. Casias tested positive for marijuana. (*Id.*, ¶ 40.) One week after Mr. Casias was notified that he tested positive, Mr. Estill informed him that Wal–Mart had terminated his employment. (*Id.*, ¶ 41.) Wal–Mart's corporate office in Arkansas, not Mr. Estill, made the decision to terminate Mr. Casias. (Estill Decl., ¶ 10.) In fact, Wal–Mart employed a specific drug screening department at its corporate headquarters for precisely this type of situation. (*Id.*) Neither Mr. Estill nor any other individual store manager had the authority or the discretion to vary from the decisions made by Wal–Mart's Drug Screening department in Arkansas. (*Id.*)

Mr. Casias admits that he used marijuana for medical purposes beginning in 2009. (Compl., ¶ 34.) Under a state law passed in 2008, the Michigan Medical Marihuana Act ("MMMA" or "the Act"), Mr. Casias qualified for a registry card, which would protect his use of marijuana from certain adverse state actions against conduct that would be illegal in Michigan but for the registry card. (*Id.*, ¶ 33.) Mr. Casias received his registry card on June 15, 2009, and he began to use marijuana after work. (*Id.*, ¶¶ 33, 35.) When he was drug tested after the accident, he showed the card to the drug-testing staff and his shift manager at Wal–Mart. (*Id.*, ¶¶ 37–40.) He also told Mr. Estill about it when Mr. Estill informed him of Wal–Mart's termination decision, but Mr. Estill informed Mr. Casias that Wal–Mart's drug use policy has no exception for the MMMA. (*Id.*, ¶ 41.)

Mr. Casias filed a complaint in Calhoun County Circuit Court on June 29, 2010, alleging wrongful discharge in violation of public policy and a violation of the MMMA against Wal–Mart and Mr. Estill. The ***917** defendants removed the action to this Court (docket # 1). Before the Court are two motions: Mr. Casias's motion to remand to state court for lack of diversity jurisdiction (docket # 9) and the defendants' motion to dismiss (docket # 16). The defendants responded to Mr. Casias's motion to remand (docket # 15) and Mr. Casias replied (docket # 23). Mr. Casias also responded to the defendants' motion to dismiss (docket # 25) and the defendants replied (docket # 28). The Court heard oral argument on the motions on November 12, 2010.

DISCUSSION

I. Mr. Casias's Motion to Remand

[1] Defendants removed this action from state court based on diversity jurisdiction under 28 U.S.C. §§ 1332, 1441(a). Yet Defendant Estill, like Plaintiff, is a Michigan citizen. This would normally defeat subject matter jurisdiction and also preclude removal under the forum defendant rule. *See* 28 U.S.C. § 1332(a)(1) (the action must be between citizens of different states); 28 U.S.C. § 1441(b) (actions based on diversity jurisdiction may be removed only if none of the properly joined and served defendants is a citizen of the state in which the action was brought). To overcome these hurdles, Defendants rely on the theory that Plaintiff fraudulently joined Mr. Estill to defeat the Court's jurisdiction. "Fraudulent joinder" is a term of art in federal jurisdictional analysis and does not require any sort of intentional wrongdoing or deceitful intentions. It is simply legal shorthand for deciding whether a particular party's citizenship should be disregarded in assessing subject matter jurisdiction.

A. Legal Principles of Removal, Fraudulent Joinder and Remand

As the removing party, the defendants bear the burden of proving the Court's subject matter jurisdiction. *See Alexander v. Elec. Data Sys. Corp.*, 13 F.3d 940, 948–49 (6th Cir.1994); 14B Charles Alan Wright, Arthur R. Miller, Edward H. Cooper & Joan E. Steinman, *Federal Practice and Procedure* § 3721 (4th ed. 2009). The Court has diversity jurisdiction over the matter only when all opposing parties are completely diverse and the amount in controversy exceeds $75,000.00. 28 U.S.C. § 1332(a). Here, the parties agree that the amount in controversy prong is satisfied, that Mr. Casias and Wal–Mart are diverse, and that Wal–Mart is not a Michigan citizen. Accordingly, removal was proper and this Court has

subject matter jurisdiction if the only proper parties are Mr. Casias and Wal–Mart. Defendant Estill, however, is a Michigan citizen, and if he is a proper defendant, then this Court does not have subject matter jurisdiction, and removal was improper. The question, then, is whether Defendant Estill is fraudulently joined to destroy the Court's diversity jurisdiction.

[2] [3] "The removing party bears the burden of demonstrating fraudulent joinder." *Alexander,* 13 F.3d at 949. The defendants' burden is heavy, since the fraudulent joinder standard is "even more favorable to plaintiffs than the standard for ruling on a motion to dismiss for failure to state a claim under Fed.R.Civ.P. 12(b)(6)." *Wolf v. Bankers Life & Cas. Co.*, 519 F.Supp.2d 674, 683 (W.D.Mich.2007) (quoting *Hartley v. CSX Transp., Inc.*, 187 F.3d 422, 424 (4th Cir.1999)). "To prove fraudulent joinder, the removing party must present sufficient evidence that a plaintiff could not have established a cause of action against non-diverse defendants under state law." *Coyne v. American Tobacco Co.*, 183 F.3d 488, 493 (1999). Unless it is clear that "there can be no recovery under the law of the state on the cause alleged or on the facts in view of the ***918** law," fraudulent joinder does not apply. *Alexander,* 13 F.3d at 949. Moreover, all disputed questions of fact and ambiguities in the controlling state law must be resolved in favor of the non-removing party. *Coyne,* 183 F.3d at 493; *Alexander,* 13 F.3d at 949. Finally, "[a]ll doubts as to the propriety of removal are resolved in favor of remand." *Boladian v. UMG Recordings, Inc.*, 123 Fed.Appx. 165, 168 (6th Cir.2005).

[4] When the district court's subject matter jurisdiction is in dispute on a Rule 12 motion, the court may consider evidence outside of the complaint. *See Bennett v. MIS Corp.*, 607 F.3d 1076, 1087, n. 11 (6th Cir.2010) ("When a district court's subject matter jurisdiction is in question, it is empowered to review extra-complaint evidence and resolve factual disputes."); *see also* Wright, Miller, Cooper & Steinman, *supra*, § 3723. When a party makes an allegation of fraudulent joinder, the court may be required to "pierce the pleadings" and consider summary-judgment type evidence, including affidavits and declarations. *Dodd v. Fawcett Publications, Inc.*, 329 F.2d 82, 85 (10th Cir.1964); *Miller v. PPG Indus., Inc.*, 237 F.Supp.2d 756, 759, n. 5 (W.D.Ky.2002). All parties have had the opportunity to submit evidence under this rule, and Defendants submitted a declaration from Defendant Estill. The declaration states that Mr. Estill did not make or recommend the decision to terminate Mr. Casias but was instead directed by Wal–Mart's corporate office to do so. (Estill Decl., ¶ 10.) Mr. Casias has not challenged or rebutted the affidavit. The standard for demonstrating fraudulent joinder is demanding, but Defendants have satisfied it here.

B. Joseph Casias Cannot Establish a Cause of Action Against Troy Estill

[5] The MMMA prohibits denial "of any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau" for marijuana use in compliance with the act. M.C.L. § 333.26424(a). Mr. Casias claims this provision creates a new public policy in the State of Michigan that prohibits a private employer from taking disciplinary action against an employee based on conduct protected—or at least arguably protected[3]—from criminal prosecution under the MMMA. The Court assumes, for purposes of the remand motion only, that Mr. Casias's termination was wrongful under some cause of action and that a private business may be liable in damages. Even with these assumptions in place, the Court must still determine whether Mr. Estill could possibly be held personally liable under the circumstances presented in this case.

3 Michigan courts have not clearly defined the scope of the MMMA's protections and have in fact warned Michigan citizens about using marijuana under this Act. *See People v. Redden*, 290 Mich.App. 65, 799 N.W.2d 184, 2010 WL 3611716 (Mich.App., Sept. 14, 2010) (O'Connell, P.J., concurring) ("Until [the Michigan] Supreme Court and the Legislature clarify and define the scope of the MMMA, it is important to proceed cautiously when seeking to take advantage of the protections in it. Those citizens who proceed without due caution will become test cases and may lose both their property and their liberty.").

[6] Under Michigan law, "corporate officials may be held personally liable for their individual tortious acts done in the course of business, regardless of whether they were acting for their personal benefit or for the corporation's benefit." *Dep't of Agric. v. Appletree Marketing, LLC*, 485 Mich. 1, 17, 779 N.W.2d 237 (2010). This principle has been applied to a variety of tortious behavior. *See, e.g., Elezovic v.* ***919** *Bennett*, 274 Mich.App. 1, 14, 731 N.W.2d 452 (2007) (sexual harassment claim brought under the Elliott Larsen Civil Rights Act); *Att'y Gen. v. Ankersen*, 148 Mich.App. 524, 557–58, 385 N.W.2d 658 (1986) (nuisance); *Allen v. Morris Bldg. Co.*, 360 Mich. 214, 217, 103 N.W.2d 491 (1960) (willful change in natural flowage of water); *Bush v. Hayes*, 286 Mich. 546, 549–50, 282 N.W. 239 (1938) (conversion). Michigan

courts have refrained from applying personal liability to all wrongful conduct of corporate officials, however. *See, e.g., Reed v. Michigan Metro Girl Scout Council*, 201 Mich.App. 10, 13, 506 N.W.2d 231 (1993) ("It is now settled law that corporate agents are not liable for tortious interference with the corporation's contracts unless they acted solely for their own benefit with no benefit to the corporation."). No court has yet ruled that the potential reach of the MMMA is wide enough to apply to corporate officials individually. Indeed, the statute by its terms does not even address potential civil liability for anyone, and does not create a private cause of action against anyone.[4] The focus of the statute is exclusively on staying the hand of state power, not private action of any kind, all as more fully explained later in this opinion. All that said, these weaknesses in the potential claim against Defendant Estill personally may not, standing alone, be enough to establish fraudulent joinder. They may simply demonstrate that Mr. Casias's likelihood of success against Defendant Estill is remote, not beyond all plausibility, at least under a brand new statute.

[4] As explained later in this opinion, neither the text nor purpose of the MMMA affords Mr. Casias the protection he seeks. Mr. Casias's interpretation extracts the word "business" from its statutory context and uses that single word as a mantra that opens the door to regulation of all private employment decisions in the state. Even assuming the MMMA went this far—and it does not—it would still not impose individual liability upon managers such as Mr. Estill. The MMMA does not define "business." *See* M.C.L. § 333.26423 (list of definitions). In contrast, Michigan's Elliott Larsen Civil Rights Act ("ELCRA"), which prohibits an "employer" from engaging in employment discrimination, *see* M.C.L. § 37.2202(a), carefully defines the term to include an employer's agent. M.C.L. § 37.2201(a). The drafters of the MMMA did no such thing in their use of the term "business" or "employer."

But this is not all, and what is left is enough to establish fraudulent joinder. Even assuming that personal liability for a corporate official could theoretically attach under the MMMA-wrongful termination context, the law would still require some level of involvement in the wrongful activity for individual liability to apply in Michigan. *See, e.g., Freeman v. Unisys Corp.*, 870 F.Supp. 169, 173 (E.D.Mich.1994) ("merely informational input by an employee or supervisor does not make them an agent of an employer that qualifies them for liability"); *Yanakeff v. Signature XV*, 822 F.Supp. 1264, 1266 (E.D.Mich.1993) (defendant "had no control over the decision to terminate plaintiff"; rather, "her input was merely informational"); *Champion v. Nationwide Security, Inc.*, 205 Mich.App. 263, 266, 517 N.W.2d 777 (1994), *rev'd on other grounds*, 450 Mich. 702, 545 N.W.2d 596 (1996) (noting that defendant must have "significant control" over "hiring, firing, promoting, or disciplining to be considered an agent") (citing *Kauffman v. Allied Signal, Inc.*, 970 F.2d 178, 186 (6th Cir.1992)); *Urbanski v. Sears Roebuck & Co.*, 2000 WL 33421411, *3 (Mich.App.2000) ("Although a supervisor need not have complete authority over hiring, firing, promoting or disciplining to be considered an agent, the supervisor must have 'significant control' of those duties."). Michigan courts have rejected the idea that any participation, however slight, is ***920** sufficient to expose an individual to personal liability for a corporation's wrongful conduct. *See, e.g., Bush v. Hayes*, 286 Mich. at 549, 282 N.W. 239 (describing the employee as an "active participant"); *Allen v. Morris Bldg. Co.*, 360 Mich. at 217, 103 N.W.2d 491 (employee was "in control" of corporation's activities and personally supervised its operations). Mr. Casias cannot possibly meet this standard on the claim against Defendant Estill.

Here, Mr. Casias's challenge is to Wal–Mart's corporate policy, not to any decision applying the policy by Defendant Estill. All Mr. Estill did is communicate the corporation's policy decision to Mr. Casias. Defendant Estill was simply an information conduit. The decision to fire Mr. Casias was actually made by Wal–Mart's corporate office, specifically the drug screening department, under a corporate-wide policy leaving no room for managerial discretion. Mr. Estill did not have any control, much less significant control, over the employment status of those employees, like Mr. Casias, who used marijuana, or any other prohibited drug under the company policy. Contrary to Mr. Casias's contention, acting solely as a messenger cannot impose liability on a corporate employee. Such a holding would be unprecedented under Michigan law. It would effectively expose the receptionist or secretary who typed the termination letter or delivered the termination message to the theoretical risk of personal liability.

Mr. Casias's complaint is with the corporate-wide policy that mandated his termination in this case. There is no legally colorable basis for a claim against Defendant Estill personally, or against any other individual who served in some capacity as simple messengers of a foreordained company decision under a company-wide policy applicable to the use of prohibited drugs on or off the job. Accordingly, the Court finds that Defendant Estill's citizenship must be disregarded in assessing diversity. The Court has subject matter jurisdiction, and Plaintiff's motion to remand must be denied.

II. Motion to Dismiss

Defendants move to dismiss the matter under Rule 12(b)(6) for failure to state a claim. The defendants argue first that the MMMA is preempted by the federal Controlled Substances Act and the federal Americans with Disabilities Act. Defendants also argue that the MMMA does not create a private right of action in this circumstance and does not confer any employment protections on medical marijuana users. Because the text of the MMMA does not bestow the employment protections Mr. Casias seeks, and because this is dispositive of Mr. Casias's claim, the Court does not reach the issue of the MMMA's preemption by federal statutes. *See Qwest Corp. v. City of Santa Fe, New Mexico,* 380 F.3d 1258, 1267 n. 7 (10th Cir.2004) ("Because federal preemption of a state or local law is premised on the Supremacy Clause of the United States Constitution and because of the longstanding principle that federal courts should avoid reaching constitutional questions if there are other grounds upon which a case can be decided," the Court must determine whether the matter can be decided without turning to federal preemption.); *BellSouth Telecommunications, Inc. v. Town of Palm Beach,* 252 F.3d 1169, 1176 (11th Cir.2001).

A. Motion to Dismiss Standard

To survive the defendants' motion to dismiss under Rule 12(b)(6), Mr. Casias "must allege facts that, if accepted as true, are sufficient 'to raise a right to relief above the speculative level,' and to 'state a claim to relief that is plausible on its face.' " ***921** *Hensley Mfg. v. ProPride, Inc.,* 579 F.3d 603, 609 (6th Cir.2009) (quoting *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (internal citations omitted)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw a reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (quoting *Ashcroft v. Iqbal,* 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009)). A court must accept as true all factual allegations, but it need not accept legal conclusions. *See Iqbal,* 129 S.Ct. at 1949. "Only a complaint that states a plausible claim for relief survives a motion to dismiss." *Id.* at 1950.

B. The Michigan Medical Marihuana Act Does Not Regulate Private Employment

[7] Mr. Casias bases his claim for relief on two different theories. First, Plaintiff argues the MMMA provides him with an implied right of action. Even Mr. Casias acknowledges his chances on this theory are remote, given the strictness of the current test in Michigan case law. *See Lash v. City of Traverse City,* 479 Mich. 180, 192–93, 735 N.W.2d 628 (2007) (a private right of action cannot be inferred without evidence of legislative intent). Under his second theory, Mr. Casias's cause of action stems from the defendant's alleged violation of the public policy of Michigan, as found in the MMMA. *See Suchodolski v. Michigan Consol. Gas Co.,* 412 Mich. 692, 695, 316 N.W.2d 710 (1982) ("some grounds for discharging an employee are so contrary to public policy as to be actionable"). One may reasonably ask whether this theory is anything but an end run on the stringent private cause of action test. After all, if the alleged public policy at issue is created by statute, and if the statute does not itself create a private cause of action to enforce the policy, where does a court receive the power to create a remedy anyway? This would seem to do under the rubric of "public policy" exactly what the Michigan Supreme Court prohibits in *Lash:* namely, implying a private cause of action in the absence of legislative intent. But under either theory—even assuming the *Suchodolski* public policy theory survives—Plaintiff would have to show that the statutory policy at issue applies to this case. Plaintiff cannot possibly do so here, because the MMMA addresses potential adverse action by the state; it does not regulate private employment. Accordingly, his claims must be dismissed.

[8] The foremost goal in statutory interpretation is to give effect to the lawmakers' intent. *See Sun Valley Foods Co. v. Ward,* 460 Mich. 230, 236, 596 N.W.2d 119 (1999). Because the MMMA was an initiated state statute, the Court must analyze the intent of Michigan voters who actually passed the legislation and interpret the statute consistent with that intent. *Potter v. McLeary,* 484 Mich. 397, 410–11, 774 N.W.2d 1 (2009). To do this, a court turns to the language of the statute, *Briggs Tax Service, L.L.C. v. Detroit Public Schools,* 485 Mich. 69, 76, 780 N.W.2d 753 (2010), and "consider[s] both the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme." *Sun Valley,* 460 Mich. at 237, 596 N.W.2d 119 (quoting *Bailey v. United States,* 516 U.S. 137, 145, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995) (internal quotation marks omitted)). "[T]he entire act must be read, and the interpretation to be given to a particular word in one section arrived at after due consideration of every other section so as to produce, if possible, a harmonious and consistent enactment as a whole." *Pi–Con, Inc. v. A.J. Anderson Const. Co.,* 435 Mich. 375, 403–04, 458 N.W.2d 639 (1990) (quoting *Grand Rapids v. Crocker,* 219 Mich. 178, 182–83, 189 N.W. 221 (1922)).

The fundamental problem with Plaintiff's case is that the

MMMA does not ***922** regulate private employment. Rather, the Act provides a potential defense to criminal prosecution or other adverse action by *the state*. *See* M.C.L. § 333.26422(b) ("changing state law will have the practical effect of protecting *from arrest* the vast majority of seriously ill people who have a medical need to use marihuana") (emphasis added); *People v. Redden*, 290 Mich.App. 65, 799 N.W.2d 184, 2010 WL 3611716 (Mich.App. Sept. 14, 2010) (Meter, J.) ("The ballot proposal explicitly informed voters that the law would permit registered and unregistered patients to assert medical reasons for using marijuana *as a defense to any prosecution* involving marijuana.") (emphasis added). The MMMA is directed at governmental conduct, and even here the protection is very narrow. Indeed, the MMMA does not even formally "de-criminalize" the use of medical marijuana; rather, it simply provides an affirmative defense and other similarly limited protections in the face of criminal proceedings. As the Michigan Court of Appeals recognized in *Redden*, possession and use of marijuana in Michigan—even for medical purposes—is still a crime. *Id.*, 2010 WL 3611716 (O'Connell, P.J., concurring) (noting that the MMMA provides an *affirmative defense*, but does not legalize the use of marijuana). All the MMMA does is give some people limited protection from prosecution by the state, or from other adverse state action in carefully limited medical marijuana situations.[5]

[5] The use of marijuana is still a federal felony. *See* 21 U.S.C. § 812; 21 U.S.C. § 841(a)(1); M.C.L. § 333.26422(c) ("federal law currently prohibits any use of marihuana except under very limited circumstances"). Nothing in the state law could, of course, change this. Accordingly, one implication of Plaintiff's theory is that the MMMA would expose a Michigan employer to civil liability for firing an employee for engaging in conduct that amounts to a federal felony. Ironically, under Plaintiff's theory, the federal felon would have this special protection, but an employee using a legal drug under prescription would not enjoy the same employment protection. Nothing in the MMMA or in the exercise of simple common sense supports such a result.

In contrast to what the MMMA does address—potential state prosecution or other potential adverse state action—the MMMA says nothing about private employment rights. Nowhere does the MMMA state that the statute regulates private employment, that private employees are protected from disciplinary action should they use medical marijuana, or that private employers must accommodate the use of medical marijuana outside of the workplace. Under Plaintiff's theory, no private employer in Michigan could take any action against an employee based on an employee's use of medical marijuana. This would create a new protected employee class in Michigan and mark a radical departure from the general rule of at-will employment in Michigan. *See Lytle v. Malady*, 458 Mich. 153, 163, 579 N.W.2d 906 (1998) ("Generally, and under Michigan law by presumption, employment relationships are terminable at the will of either party."). Moreover, the MMMA would also regulate, under the logical conclusion of Plaintiff's theory, tenants in private housing, students at private educational institutions, and other private business actors. Yet the MMMA contains *no language* stating that it repeals the general rule of at-will employment in Michigan or that it otherwise limits the range of allowable private decisions by Michigan businesses. The protections that the Act does provide apply to actions by the *state:* "a person shall not be denied custody or visitation," M.C.L. § 333.26424(c), "a patient ... may assert the medical purpose for using marihuana as a defense to any prosecution involving ***923** marihuana," M.C.L. § 333.26428(a), "marihuana ... that is possessed, owned, or used in connection with the medical use of marihuana ... shall not be seized or forfeited," M.C.L. § 333.26424(h). In contrast, the Act does not mention regulation of private actors, including private employers.

The textual hinge for Plaintiff's expansive reading of the statute does not bear the weight of Plaintiff's argument. Section 26424(a), the MMMA states:

> A qualifying patient who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of marihuana in accordance with this act ...

M.C.L. § 333.26424(a). According to Plaintiff, the simple word "business" expands the reach of the MMMA to all private activity taken by a "business," including employment decisions. The word "business" is not defined in the MMMA. *See* M.C.L. § 333.26423 (list of definitions), but it recurs throughout the statute as part of the phrase "business or occupational or professional licensing board or bureau." Mr. Casias relies on the single word "business" in subsection 26424(a) as the only positive textual support for his position that the MMMA

shields him from termination. This one word, torn from its overall context, does not do what Mr. Casias wants it to do. The language, structure, and purpose of the MMMA all signify that the statute was not meant to govern private employment decisions like the one at issue here.

A consistent reading of the phrase throughout the MMMA demonstrates that "business" is not meant to stand alone, but instead modifies "licensing board or bureau." Wherever the undefined word "business" appears in the statute, it is as part of the phrase: "civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau." *See, e.g.,* M.C.L. § 333.26424(a). This is thoroughly consistent with the overall structure and purpose of the Act to address potential criminal prosecution or other adverse action by the state. Moreover, the statute itself supports this contextual construction. In subsection 26424(f), the recurring phrase includes a critical clue to the intended meaning of the term:

> A physician shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by the Michigan board of medicine, the Michigan board of osteopathic medicine and surgery, or any *other* business or occupational or professional licensing board or bureau, solely for providing written certifications ...

M.C.L. § 333.26424(f) (emphasis added). Because "words grouped in a list must be given related meaning," *Griffith v. State Farm Mut. Auto. Ins. Co.*, 472 Mich. 521, 533, 697 N.W.2d 895 (2005), "business" in subsection 26424(f) must have a related meaning to other words in the list, namely Michigan board of medicine, Michigan board of osteopathic medicine and surgery, and occupational or professional licensing board or bureau. The added term "*other* business or occupational or professional licensing board or bureau" underscores the point. It is clear from the examples put forth that the statute contemplated discipline from boards and bureaus of the state—whether described as business boards, occupational boards or professional licensing boards—not the entire realm of private employment. In that list, "business" must act as a modifier of "board or bureau," not as an independent entity, for ***924** the word to have a related meaning. "Business" must then consistently be used as a modifier throughout the statute, not just in subsection 26424(f).

That the drafters of the MMMA chose to separate the list of modifiers of "licensing board or bureau" by disjunctives rather than a comma does not defeat this common-sense reading of the statute. Using commas and one disjunctive may be the more common method of listing a series, but the drafters were not required to do so. *See The Chicago Manual of Style* ¶ 6.18 (16th ed. 2010) ("In a series whose elements are all joined by conjunctions, no commas are needed unless the elements are long and delimiters would be helpful."). Moreover, limiting "business" to act as a modifier and not a stand-alone term still gives "business" meaning. *See Stevens v. Employer–Teamsters Joint Council No. 84 Pension Fund*, 979 F.2d 444, 452 (6th Cir.1992) (phrases joined by a disjunctive should be given separate meanings). Local governments in Michigan issue business licenses, which are distinguishable from professional or occupational licenses.[6]

[6] See *http://www.grand-rapids.mi.us/index.pl?pageid=5237* for a list of business licenses required in Grand Rapids, Michigan, and *http://www.detroitmi.gov/Business/BusinessLicenses.aspx* for information on business licenses in Detroit, Michigan.

[9] Mr. Casias points to subsection 26427(c)(2) as additional evidence of employment regulation. That section states that nothing in the MMMA requires "[a]n employer to accommodate the ingestion of marihuana in any workplace or any employee working while under the influence of marihuana." M.C.L. § 333.26427(c)(2). This sole mention of employment does not operate as a negative inference, prohibiting private employers from disciplining an employee who uses medical marijuana away from the workplace. "[A] negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute." *Hamdan v. Rumsfeld*, 548 U.S. 557, 578, 126 S.Ct. 2749, 165 L.Ed.2d 723 (2006). The language excluded from subsection 26427(c) is not included anywhere else in the statute, since the MMMA never mentions private employers or employees other than in this section. The Court cannot then draw a negative inference about employment protections when the remainder of the statute is silent on the rights of employees. Moreover, Michigan voters could not have intended to enact private employment regulation implicitly, through a negative inference, when the rights of employees are never mentioned anywhere else in the

statute.[7]

[7] A similar provision in Washington's medical marijuana act received similar treatment. *See Roe v. TeleTech Customer Care Management, LLC,* 152 Wash.App. 388, 398–99, 216 P.3d 1055 (2009). The Washington statute states that "[n]othing in this chapter requires any accommodation of any on-site medical use of marijuana in any place of employment ..." R.C.W.A. § 69.51A.060(4). The court stated:

> the average informed lay voter would not read this provision as creating a corollary duty for employers to accommodate an employee's medical use of marijuana *outside* the workplace where MUMA expressly creates no such duty *inside* the workplace. To the contrary, absent the strained construction Roe urges, the provision implies that MUMA will place no requirements on employers or places of employment. Moreover, it is unlikely that voters intended to create such a sweeping change to current employment practices, as Roe suggests, through negative implication, when prior statutes imposing duties on private employers have done so only with explicit language.

TeleTech, 152 Wash.App. at 398–99, 216 P.3d 1055.

The purpose of the MMMA only confirms that it was not meant to regulate ***925** private employment, but rather protect medical marijuana users from state action. None of the declarations indicate that the act is meant to address employment decisions or discipline. *See* M.C.L. § 333.26242. The introductory language on the ballot listed a variety of purposes of the statute, including to "permit registered and unregistered patients and primary caregivers to assert medical reasons for using marijuana as a defense to any prosecution involving marijuana," but it did not state that the MMMA also provided employment protections to medical marijuana users. *See* http://www.procon.org/sourcefiles/Michigan_Ballot_Proposal_2008.pdf. The preamble to the MMMA expresses that it "provide[s] protections for the medical use of marihuana." This statement however, does not imply that medical marijuana users are protected from all possible consequences of their marijuana use. *See People v. Redden,* 2010 WL 3611716 (O'Connell, P.J., concurring) ("The MMMA does not codify a *right* to use marijuana; instead, it merely provides a procedure which seriously ill individuals using marijuana for its palliative effects can be identified and protected from prosecution under state law.") (emphasis in original). The MMMA does not protect anyone from federal prosecution for marijuana, for example. *See* 21 U.S.C. § 812; 21 U.S.C. § 841(a)(1); M.C.L. § 333.26422(c) ("federal law currently prohibits any use of marihuana except under very limited circumstances").

Further, the MMMA does not indicate a general policy on behalf of the State of Michigan to create a special class of civil protections for medical marijuana users. The MMMA contains no "explicit legislative statements prohibiting the discharge, discipline, or other adverse treatment of employees who act in accordance with a statutory right or duty," because the MMMA does not confer any statutory rights. *Suchodolski,* 412 Mich. at 695, 316 N.W.2d 710; *see Redden,* 2010 WL 3611716 (O'Connor, P.J., concurring) ("the MMMA does not create any sort of affirmative *right* under state law to use or possess marijuana") (emphasis in original). Under Mr. Casias's reading of the MMMA, medical marijuana users would enjoy the kind of employment safeguards offered to only a very few groups under Michigan law. *See, e.g.,* M.C.L. § 37.2202(1) ("religion, race, color, national origin, age, sex, height, weight, or marital status"); M.C.L. § 37.1102(1) (disability); M.C.L. § 15.362 (whistle-blowers). The MMMA's reference to "business" does not elevate medical marijuana users to the same status as those groups that receive explicit protection from other Michigan statutes.

Mr. Casias cannot establish that the MMMA contains either a statutory right without a remedy or an implied private cause of action. The text, structure, and purpose of the MMMA belie Plaintiff's claim that the Act regulates private employment.[8] Contrary to Mr. Casias's assertion, ***926** the impacts of any private employment regulation in the MMMA would be broadly felt and would extend the statute's protections much further than the MMMA meant to do. If the voters of Michigan meant to enact such sweeping legislation, they had to do so explicitly. Instead, they enacted a statute whose language and purpose simply protects medical marijuana users from prosecution and other similar actions of state and local governments, and does not attempt to regulate private employment decisions.

[8] The Court notes that no other medical marijuana statute has been held to regulate private employment. *See, e.g., Roe v. TeleTech Customer Care Management LLC,* 152 Wash.App. 388, 396, 216 P.3d 1055 (2009) ("We hold that by enacting MUMA, the voters did not intend, either explicitly or implicitly, to create a civil cause of action and MUM does not imply a private right of action."); *Johnson v. Columbia Falls Aluminum Co.,* 350 Mont. 562, 2009 WL 865308 (2009) ("[T]he MMA does not provide an employee with an express or implied right of action against an employer."); *Ross v. RagingWire Telecommunications, Inc.,* 42 Cal.4th 920, 70 Cal.Rptr.3d 382, 174 P.3d 200 (2008) ("Nothing in

the text or history of the Compassionate Use Act suggests the voters intended the measure to address the respective rights and obligations of employers and employees."). Mr. Casias cannot point to any other state statute that protects the private employment of medical marijuana users.

CONCLUSION

The MMMA meant to provide some limited protection for medical marijuana users from state actions, primarily arrest and prosecution. Even the scope of that protection is unclear and limited. *See Redden*, 2010 WL 3611716 (O'Connell, P.J., concurring). Nothing in the language or the purpose of the MMMA indicates an intent of the Michigan voters to regulate private employment, and the MMMA does not address private employment directly. Whatever protection the MMMA does provide users of medical marijuana, it does not reach to private employment. Accordingly, Plaintiff's motion to remand (docket # 9) is **DENIED** and Defendants' motion to dismiss (docket # 16) is **GRANTED.**

IT IS SO ORDERED.

All Citations

764 F.Supp.2d 914, 31 IER Cases 1565

End of Document

KeyCite Yellow Flag - Negative Treatment
Declined to Follow by Braska v. Challenge Mfg. Co., Mich.App., October 23, 2014

695 F.3d 428
United States Court of Appeals,
Sixth Circuit.

Joseph CASIAS, Plaintiff–Appellant,
v.
WAL–MART STORES, INC.; Wal–Mart Stores East, L.P.; and Troy Estill, Defendants–Appellees.

No. 11–1227.
|
Argued: April 18, 2012.
|
Decided and Filed: Sept. 19, 2012.
|
Rehearing and Rehearing En Banc* Denied Oct. 26, 2012.**

* Judge Rogers recused himself from participation in this ruling.

** Judge Moore would grant rehearing for the reasons stated in her dissent.

Synopsis
Background: Former employee sued former employer and individual store manager in state court, claiming wrongful discharge in connection with his termination after he tested positive for marijuana. Action was removed to federal court. The United States District Court for the Western District of Michigan, Robert J. Jonker, J., 764 F.Supp.2d 914, denied employee's motion to remand, and dismissed the action.

Holdings: The Court of Appeals, Clay, Circuit Judge, held that:

[1] manager was fraudulently joined, and thus, remand was not warranted, and

[2] Michigan Medical Marihuana Act (MMMA) did not restrict private employer's ability to discipline employee for medical marijuana use, and thus, could not support wrongful discharge claim.

Affirmed.

Karen Nelson Moore, Circuit Judge, filed dissenting opinion.

Attorneys and Law Firms

***430 ARGUED:** Scott Michelman, American Civil Liberties Union Foundation, Santa Cruz, California, for Appellant. Susan M. Zoeller, Barnes & Thornburg, LLP, Indianapolis, Indiana, for Appellees. **ON BRIEF:** Scott Michelman, American Civil Liberties Union Foundation, Santa Cruz, California, Daniel S. Korobkin, Michael J. Steinberg, American Civil Liberties Union Fund of Michigan, Detroit, Michigan, Daniel W. Grow, Targowski & Grow, PLLC, Kalamazoo, Michigan, for Appellant. Susan M. Zoeller, Barnes & Thornburg, LLP, Indianapolis, Indiana, Michael P. Palmer, Barnes & Thornburg, LLP, South Bend, Indiana, for Appellees.

Before: SUHRHEINRICH, MOORE, and CLAY, Circuit Judges.

CLAY, J., delivered the opinion of the court, in which SUHRHEINRICH, J., joined. MOORE, J. (pp. 437–39), delivered a separate dissenting opinion.

***431 OPINION**

CLAY, Circuit Judge.

In this wrongful discharge action, Plaintiff Joseph Casias, a former Wal–Mart employee, appeals the district court's order denying his motion to remand and the dismissal for failure to state a claim following his termination for failing a drug test in violation of Defendants' drug testing policy. Because we find no reasonable basis to conclude that the non-diverse Defendant Troy Estill ("Estill") would be liable and because we hold that the Michigan Medical Marihuana Act (MMMA) does not regulate private employment, we **AFFIRM** the judgment of the district court.

DISCUSSION

I. The Michigan Medical Marihuana Act

In 2008, Michigan passed the MMMA, Mich. Comp. Laws § 333.26421 *et seq.*, to provide protections for the medical use of marijuana. The Act defines the term "medical use" to include "the acquisition, possession, cultivation, manufacture, use, internal possession, delivery, transfer, or transportation of marihuana or paraphernalia relating to the administration of marihuana to treat or alleviate a registered qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition." *Id.* § 333.26423(e). Although the Act broadly defines a "debilitating medical condition," only a "qualifying patient" or "primary caregiver" who is issued a "registry identification card" by the Michigan Department of Community Health are permitted to administer or use medical marijuana. *Id.* §§ 333.26423(h), (g), (i). Thus any "qualifying patient" or "primary caregiver who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty of any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business." *Id.* §§ 333.26424(a),(b).

II. Plaintiff's termination from Wal–Mart

Plaintiff was an employee of Wal–Mart's Battle Creek, Michigan store from November 1, 2004 until November 24, 2009, when Plaintiff was terminated from Wal–Mart after he tested positive for marijuana, in violation of the company's drug use policy.

Plaintiff was diagnosed with sinus cancer and an inoperable brain tumor at the age of 17. During his employment at Wal–Mart, Plaintiff endured ongoing pain in his head and neck. Although his oncologist prescribed pain relief medication, Plaintiff continued to experience constant pain as well as other side effects of his medication. After Michigan passed the MMMA in 2008, Plaintiff's oncologist recommended that he try marijuana to treat his medical condition. The Michigan Department of Community Health issued Plaintiff a registry card on June 15, 2009, and, in accordance with state law, he began using marijuana for pain management purposes. Plaintiff stated that the drug reduced his level of pain and also relieved some of the side effects from his other pain medication. Plaintiff maintains that he complied with the state laws and never used marijuana while at work; nor did he come to work under the influence. Instead, Plaintiff used his other prescription medication during the workday and only used the marijuana once he returned home from work.

In November 2009, Plaintiff injured himself at work by twisting his knee the wrong way while pushing a cart. Plaintiff contends that he was not under the influence of marijuana at the time of his accident. Although Plaintiff came to work the ***432** next day, he had trouble walking and was driven to the emergency room by a Wal–Mart manager to receive treatment. Since Plaintiff was injured on the job, he was administered a standard drug test at the hospital in accordance with Wal–Mart's drug use policy for employees. Prior to his drug test, Plaintiff showed his registry card to the testing staff to indicate that he was a qualifying patient for medical marijuana under Michigan law. Plaintiff then underwent his drug test, wherein his urine was tested for drugs.

One week later, Defendant notified Plaintiff that he tested positive for marijuana. Plaintiff immediately met with his shift manager to explain the positive drug test. Plaintiff showed the manager his registry card and also stated that he never smoked marijuana while at work or came to work under the influence of the drug. Plaintiff explained that the positive drug test resulted from his previous ingestion of marijuana within days of his injury in order to treat his medical condition. The shift manager made a photocopy of Plaintiff's registry card.

The following week, Wal–Mart's corporate office directed the store manager, Defendant Troy Estill, to fire Plaintiff due to the failed drug test, which was in violation of the company's drug use policy. Wal–Mart did not honor Plaintiff's medical marijuana card. Plaintiff sued Wal–Mart and Estill in state court for wrongful discharge and violation of the MMMA, arguing that the statute prevents a business from engaging in disciplinary action against a card holder who is a qualifying patient. Defendants thereafter removed the case to federal court based on diversity jurisdiction under 28 U.S.C. §§ 1332, 1441(a), and moved to dismiss the action for failure to state a claim. Plaintiff moved to remand the case to state court on the basis that Defendant Estill is a Michigan citizen, as is Plaintiff, and was properly joined, therefore eliminating diversity jurisdiction. Plaintiff also opposed Defendants' motion to dismiss.

The district court denied Plaintiff's motion to remand and granted Defendants' motion to dismiss. The district court held that Estill was fraudulently joined and could not be held liable under Michigan law because he did not make the decision to terminate Plaintiff, nor did he have the authority to fire Plaintiff. Therefore, the district court determined that Estill's citizenship should be disregarded for purposes of determining diversity jurisdiction. In

addition, the district court held that the MMMA does not protect Plaintiff's right to bring a wrongful termination action because the MMMA does not regulate private employment. Plaintiff now appeals.

DISCUSSION

I. Motion to Remand

[1] [2] [3] [4] [5] [6] We review a district court's ruling on the issue of jurisdiction *de novo*, but the district court's factual findings are reviewed for clear error. *Coyne v. American Tobacco Co.*, 183 F.3d 488, 492 (6th Cir.1999). "When a non-diverse party has been joined as a defendant, then in the absence of a substantial federal question the removing defendant may avoid remand only by demonstrating that the non-diverse party was fraudulently joined." *Jerome–Duncan, Inc. v. Auto–By–Tel, L.L.C.*, 176 F.3d 904, 907 (6th Cir.1999) (citation omitted). Fraudulent joinder is "a judicially created doctrine that provides an exception to the requirement of complete diversity." *Coyne*, 183 F.3d at 493 (quoting *Triggs v. John Crump Toyota, Inc.*, 154 F.3d 1284, 1287 (11th Cir.1998) (alteration in original)). A defendant is fraudulently joined if it is "clear that there can be no recovery under the law of the state on the cause alleged or on the facts ***433** in view of the law ..." *Alexander v. Elec. Data Sys. Corp.*, 13 F.3d 940, 949 (6th Cir.1994) (citation omitted). The relevant inquiry is whether there is "a colorable basis for predicting that a plaintiff may recover against [a defendant]." *Coyne*, 183 F.3d at 493. "The removing party bears the burden of demonstrating fraudulent joinder." *Alexander*, 13 F.3d at 949 (citation omitted).

[7] [8] [9] When deciding a motion to remand, including fraudulent joinder allegations, we apply a test similar to, but more lenient than, the analysis applicable to a Rule 12(b)(6) motion to dismiss. *See Walker v. Philip Morris USA, Inc.*, 443 Fed.Appx. 946, 952–54 (6th Cir.2011). As appropriate, we may "pierce the pleading" and consider summary judgment evidence, such as affidavits presented by the parties. *Id.* The court may look to material outside the pleadings for the limited purpose of determining whether there are "undisputed facts that negate the claim." *Id.* at 955–56.

[10] Plaintiff argues that the district court improperly asserted diversity jurisdiction because Defendant Estill, a Michigan citizen, was a proper defendant in this case. According to Plaintiff, Defendant Estill participated in the tortious conduct alleged by Plaintiff by firing him from his position at Wal–Mart, and therefore was personally liable and properly joined in this action. In response, Defendants contend that Plaintiff failed to establish a colorable claim because Defendant Estill had no involvement in Plaintiff's termination. Defendants further argue that, under Michigan law, corporate agents cannot be liable for a wrongful discharge action.

In dismissing Plaintiff's motion to remand on the grounds of fraudulent joinder, the district court concluded that personal liability did not attach to Defendant Estill. In reaching this conclusion, the district court relied on federal and state cases that discuss employee liability. *See, e.g., Freeman v. Unisys Corp.*, 870 F.Supp. 169, 173 (E.D.Mich.1994); *Champion v. Nationwide Security, Inc.*, 205 Mich.App. 263, 266, 517 N.W.2d 777 (1994), *rev'd on other grounds*, 450 Mich. 702, 545 N.W.2d 596 (1996); *Urbanski v. Sears Roebuck & Co.*, No. 211223, 2000 WL 33421411, at *3 (Mich.Ct.App. May 2, 2000); *Bush v. Hayes*, 286 Mich. 546, 282 N.W. 239, 240–41 (1938); and *Allen v. Morris Bldg. Co.*, 360 Mich. 214, 103 N.W.2d 491, 493 (1960). The district court also relied on a number of undisputed facts, including:

> [That] Wal–Mart's corporate office in Arkansas, not Mr. Estill, made the decision to terminate Mr. Casias. In fact, Wal–Mart employed a specific drug screening department at its corporate headquarters for precisely this type of situation. Neither Mr. Estill nor any other individual store manager had the authority or the discretion to vary from the decisions made by Wal–Mart's Drug Screening department in Arkansas.

Casias v. Wal–Mart Stores, Inc., 764 F.Supp.2d 914, 916 (W.D.Mich.2011). We agree with the district court's conclusion that the record is void of any evidence that would support a conclusion that Defendant Estill intended to cause an adverse action against Plaintiff or was a causal factor in the discharge of Plaintiff. Defendant Estill's role was to simply communicate the decision. On this basis, we decline to adopt Plaintiff's argument which, by extension, could make any individual who participates in the "communication" of a corporate decision a proper defendant in a cause of action.

[11] We recognize that our holding is in some tension with tort law precedent. Under the traditional doctrine of proximate ***434** cause, a tortfeasor is sometimes, but not always, liable when he intends to cause an adverse action,

Staub v. Proctor Hosp., —— U.S. ——, 131 S.Ct. 1186, 179 L.Ed.2d 144 (2011), or when he provides significant input into the ultimate employment decision. *Chattman v. Toho Tenax America, Inc.*, 686 F.3d, 339, 351 (6th Cir.2012). Michigan courts have held that, "a corporate employee or official is personally liable for all tortious or criminal acts in which he participates, regardless of whether he was acting on his own behalf or on behalf of the corporation." *Att'y Gen. v. Ankersen*, 148 Mich.App. 524, 385 N.W.2d 658, 673 (1986); *see Warren Tool Co. v. Stephenson*, 11 Mich.App. 274, 161 N.W.2d 133, 148 (1968) (applying Michigan tort law and holding that "the agents and officers of a corporation are liable for torts which they personally commit, even though in doing so they act for the corporation, and even though the corporation is also liable for the tort.") (citations omitted). There is, however, an absence of guidance from Michigan courts on the issue of a corporate employee's personal liability and the required level of individual participation necessary to establish a common-law wrongful termination action. We therefore consider Defendant Estill's liability in a wrongful termination suit in the context of other Michigan laws.

[12] Under the Michigan Elliott–Larsen Civil Rights Act (ELCRA), Mich. Comp. Laws § 37.2101 *et seq.*, a supervisor can be personally liable as an employer's agent for discriminatory employment actions if he or she "is responsible for making personnel decisions." *Urbanski*, No. 211223, 2000 WL 33421411, at *3 (citing *Jenkins v. Se. Mich. Chapter, Am. Red Cross*, 141 Mich.App. 785, 369 N.W.2d 223 (1985)).

[13] Similarly, in the context of conversion cases, personal liability attaches when a Defendant "actively participates" in the conversion. *See Citizens Ins. Co. of Am. v. Delcamp Truck Ctr., Inc.*, 178 Mich.App. 570, 444 N.W.2d 210, 213 (1989) ("When conversion is committed by a corporation, the agents and officers of the corporation may also be found personally liable for their active participation in the tort, even though they do not personally benefit thereby." (citations omitted)); *Trail Clinic, P.C. v. Bloch*, 114 Mich.App. 700, 319 N.W.2d 638, 642 (1982) ("This Court has held that where a defendant acts on his own behalf or as an officer or agent of a corporation he is personally liable for the torts in which he actively participated." (citations omitted)). Thus, Michigan courts recognize limitations on the ability to attach personal liability to corporate actors. Defendant Estill's actions fall squarely within those limitations. In this case, Defendant Estill was not a participant in the decision to terminate Plaintiff's employment and merely communicated the corporate decision to Plaintiff. His mere acquiescence to the command from Wal–Mart's corporate office to communicate Plaintiff's termination does not render him subject to personal liability.

Therefore, we find that the district court appropriately held that Defendant Estill's limited involvement in Plaintiff's discharge did not subject him to liability. The district court did not err in its conclusion that the state court complaint failed to state a plausible claim against Defendant Estill.

II. Motion to Dismiss

[14] Plaintiff next claims that the plain language and policy of the MMMA protects patients against disciplinary action in a private employment setting for using marijuana in accordance with Michigan law.

***435** [15] [16] We review *de novo* a district court's grant of a Rule 12(b)(6) motion to dismiss for failure to state a claim. *VIBO Corp. Inc. v. Conway*, 669 F.3d 675, 683 (6th Cir.2012). In order to entitle the plaintiff to relief, the complaint "does not need detailed factual allegations" but should identify "more than labels and conclusions." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (citations omitted). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Twombly*, 550 U.S. at 570, 127 S.Ct. 1955).

A. Statutory Interpretation

According to the MMMA,

> A qualifying patient who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of marihuana in accordance with this act....

Mich. Comp. Laws § 333.26424(a). The parties' dispute focuses on the use of the word "business" and whether the

word simply modifies the words "licensing board or bureau," or in the alternative, whether "business" should be read independently from "licensing board or bureau."

[17] [18] [19] [20] Under Michigan law, courts interpreting statutes "must review the entire law itself in order to arrive at the legislative intent and provide an harmonious whole. If the intent is evident from this comprehensive review of the statute, [then the] inquiry ends and [the court] employ[s] the plain intent." *Grand Traverse Cnty. v. State*, 450 Mich. 457, 538 N.W.2d 1, 4 (1995) (citation omitted). When the "language used is clear and the meaning of the words chosen is unambiguous, a common-sense reading of the provision will suffice, and no interpretation is necessary." *People v. Lee*, 447 Mich. 552, 526 N.W.2d 882, 885 (1994) (quoting *Karl v. Bryant Air Conditioning*, 416 Mich. 558, 331 N.W.2d 456 (1982)) (internal quotation marks and citations omitted). Only if the "statute is of doubtful meaning or ambiguous, is the 'door ... open to a judicial determination of the legislative intent.' " *Id.* (quoting *Knapp v. Palmer*, 324 Mich. 694, 37 N.W.2d 679, 681 (1949)).

The district court concluded that "the MMMA does not regulate private employment; [r]ather the Act provides a potential defense to criminal prosecution or other adverse action by *the state*." *Casias*, 764 F.Supp.2d. at 922–23 (emphasis in original) (citation omitted). Specifically, the court concluded that the "MMMA contains *no language* stating that it repeals the general rule of at-will employment in Michigan or that it otherwise limits the range of allowable private decisions by Michigan businesses." *Id.* (emphasis in original). Moreover, the district court found that the word "business" does not govern private employment actions. *Id.*

We agree with the district court and find that the MMMA does not impose restrictions on private employers, such as Wal–Mart. Where as here, the "statute does not define one of its terms[,] it is customary to look to the dictionary for a definition" and be mindful that "undefined words are given meaning as understood in common language, taking into consideration the text and subject-matter relative to which they are employed." *Lee*, 526 N.W.2d at 885 (citation and internal quotation marks omitted); *see also West Town Line Assocs., LLC v. Mack & Meldrum* ***436** *Assocs., LLC*, 2010 WL 785938 (Mich.Ct.App.2010) (finding that the dictionary definition of the word "business" meant a "commercial enterprise carried on and for profit," and "commercial, industrial, or professional dealings" or "an affair or matter"). Plaintiff's interpretation is entirely inconsistent with state law precedent, which requires us to "interpret the words in their context and with a view to their place in the overall statutory scheme." *Manuel v. Gill*, 481 Mich. 637, 753 N.W.2d 48, 56 (2008); *G.C. Timmis & Co. v. Guardian Alarm Co.*, 468 Mich. 416, 662 N.W.2d 710, 714 (2003) ("It is a familiar principle of statutory construction that words grouped in a list should be given related meaning.") (citations omitted).

Based on a plain reading of the statute, the term "business" is not a stand-alone term as Plaintiff alleges, but rather the word "business" describes or qualifies the type of "licensing board or bureau." Mich. Comp. Laws § 333.26424(a). Read in context, and taking into consideration the natural placement of words and phrases in relation to one another, and the proximity of the words used to describe the kind of licensing board or bureau referred to by the statute, it is clear that the statute uses the word "business" to refer to a "business" licensing board or bureau, just as it refers to an "occupational" or "professional" licensing board or bureau. The statute is simply asserting that a "qualifying patient" is not to be penalized or disciplined by a "business or occupational or professional licensing board or bureau" for his medical use of marijuana.

Plaintiff also argues that the plain language of the statute somehow regulates private employment relationships, restricting the ability of a private employer to discipline an employee for drug use where the employee's use of marijuana is authorized by the state. We find, however, that the statute never expressly refers to employment, nor does it require or imply the inclusion of private employment in its discussion of occupational or professional licensing boards. The statutory language of the MMMA does not support Plaintiff's interpretation that the statute provides protection against disciplinary actions by a business, inasmuch as the statute fails to regulate private employment actions.

We also note that other courts have found that their similar state medical marijuana laws do not regulate private employment actions. *See Johnson v. Columbia Falls Aluminum Co.*, 350 Mont. 562, 2009 WL 865308, at *2 (Mont.2009) ("The [Medical Marijuana Act] MMA specifically provides that it cannot be construed to require employers 'to accommodate the medical use of marijuana in any workplace.' ") (quoting MCA § 50–46–205(2)(b)); *Roe v. TeleTech Customer Care Mgmt., LLC*, 152 Wash.App. 388, 216 P.3d 1055 (2009) ("[I]t is unlikely that voters intended to create such a sweeping change to current employment practices [under the Medical Use of Marijuana Act]."); *Ross v. RagingWire Telecomms., Inc.*, 42 Cal.4th 920, 70 Cal.Rptr.3d 382, 174 P.3d 200, 203 (2008) ("Nothing in the text or history of the Compassionate Use Act [California's medical marijuana

law] suggests the voters intended the measure to address the respective rights and duties of employers and employees.") Thus, in addition to being unpersuasive on its face, Plaintiff's interpretation of the MMMA, which would proscribe employer terminations of qualified medical marijuana users, is in direct conflict with other states which have passed similar legislation.

B. Public Policy Interpretation

For similar reasons, we dismiss Plaintiff's argument that Plaintiff's discharge was contrary to public policy. The district ***437** court held that the MMMA did not regulate private employment but that the statute could potentially provide a defense to criminal prosecution or any other adverse action by the state. The district court concluded, therefore, that private employees are not protected from disciplinary action as a result of their use of medical marijuana, nor are private employers required to accommodate the use of medical marijuana in the workplace. In rendering its decision, the district court explained that Michigan voters could not have intended such consequences and that accepting Plaintiff's argument would create a new category of protected employees, which would "mark a radical departure from the general rule of at-will employment in Michigan." *Casias,* 764 F.Supp.2d at 922.

We agree with the district court that accepting Plaintiff's public policy interpretation could potentially prohibit any Michigan business from issuing any disciplinary action against a qualifying patient who uses marijuana in accordance with the Act. Such a broad extension of Michigan law would be at odds with the reasonable expectation that such a far-reaching revision of Michigan law would be expressly enacted. Such a broad extension would also run counter to other Michigan statutes that clearly and expressly impose duties on private employers when the duties imposed fundamentally affect the employment relationship. *See, e.g.*, Michigan Elliott–Civil Rights Act of 1976, Mich. Comp. Laws § 37.2202(1) ("An employers shall not ... discriminate against an individual with respect to employment ..."); Persons With Disabilities Civil Rights Act of 1976, Mich. Comp. Laws § 37.1102(1) ("[A]n employer shall not ... discharge or otherwise discriminate against an individual ... because of a disability ..."); and Michigan's Occupational Safety and Health Act, Mich. Comp. Laws § 4008.1002 ("This act shall apply to all places of employment in the state...."). The MMMA does not include any such language nor does it confer this responsibility upon private employers. We therefore reject Plaintiff's policy argument.[1]

[1] We need not address the issue of whether federal law preempts the MMMA based on our finding that the MMMA does not regulate private employment.

CONCLUSION

For these reasons, we **AFFIRM** the judgment of the district court.

KAREN NELSON MOORE, Circuit Judge, dissenting.

Plaintiff Joseph Casias lives in Michigan. Defendant Troy Estill lives in Michigan. The parties in this case are not diverse. In determining that the district court nonetheless had diversity-based subject-matter jurisdiction over this state-law case on the basis of fraudulent joinder, the majority improperly answers an unsettled question of Michigan law, contrary to our caselaw directing us to resolve ambiguities in state law in favor of remand. Moreover, the majority reaches out to answer this first unsettled question of Michigan law in order to address a second unsettled question of Michigan law. In so doing, we overstep our bounds as a federal court, and I respectfully dissent.

A defendant is fraudulently joined, and the court may disregard his citizenship for diversity jurisdiction purposes, only if " 'it be clear that there can be no recovery under the law of the state on the cause alleged or on the facts in view of the law.' " *Alexander v. Elec. Data Sys. Corp.*, 13 F.3d 940, 949 (6th Cir.1994) (quoting *Bobby Jones Garden Apartments, Inc. v. Suleski,* 391 F.2d 172, 176 (5th Cir.1968)). The ***438** question is whether " 'there is arguably a reasonable basis for predicting' " that the allegedly fraudulently joined defendant could be liable. *Id.* (quoting *Bobby Jones Garden Apartments,* 391 F.2d at 176); *see also Coyne v. Am. Tobacco Co.,* 183 F.3d 488, 493 (6th Cir.1999) (no fraudulent joinder "if there is a colorable basis for predicting that a plaintiff may recover against non-diverse defendants"). Because cases that are in federal court on the basis of diversity jurisdiction involve questions of state law, the values of federalism and comity instruct that a federal court "must resolve 'all disputed questions of fact and ambiguities in the controlling ... state law in favor of the non removing party.' " *Coyne,* 183 F.3d at 493 (quoting *Alexander,* 13 F.3d at 949). The question of whether " 'there is arguably a reasonable basis for predicting' " that a defendant could

be liable is not the same as whether such a claim would succeed. *Alexander,* 13 F.3d at 949 (citation omitted).

Here, it is far from clear that there is no "reasonable basis for predicting" that Estill could be liable for wrongful termination under Michigan law. Under Michigan law, "a corporate employee or official is personally liable for all tortious or criminal acts in which he participates, regardless of whether he was acting on his own behalf or on behalf of the corporation." *Att'y Gen. v. Ankersen,* 148 Mich.App. 524, 385 N.W.2d 658, 673 (1986). Michigan courts have simply not addressed the issue of a corporate employee's personal liability in the context of a common-law wrongful-termination claim and thus have not ruled on how such an employee "participates" in a wrongful termination.[1] In the context of a fraudulent-joinder ruling, federal courts are not free to predict how a state court would rule on an unsettled issue of state law; if the state law is unclear as to whether a non-diverse defendant could face liability, the federal court has no subject-matter jurisdiction and must remand the case.

[1] The majority cites two cases for the proposition that "Michigan courts recognize limitations on the ability to attach personal liability to corporate actors." Interestingly, both cases held that the actor involved was personally liable. *See Citizens Ins. Co. of Am. v. Delcamp Truck Ctr., Inc.,* 178 Mich.App. 570, 444 N.W.2d 210 (.1989); *Trail Clinic, P.C. v. Bloch,* 114 Mich.App. 700, 319 N.W.2d 638 (1982).

Even applying the standard for agency liability under Michigan's Elliott–Larsen Civil Rights Act ("ELCRA"), the issue of Estill's liability under the circumstances in this case is not clear. Michigan courts have held that "a supervisor need not have complete authority over hiring, firing, promoting or disciplining" to be personally liable as an employer's agent for discriminatory-employment actions under the ELCRA. *Urbanski v. Sears Roebuck & Co.,* No. 211223, 2000 WL 33421411, at *3 (Mich.Ct.App. May 2, 2000). Estill is the store manager, which certainly suggests some degree of control over personnel decisions; more importantly for present purposes, Wal–Mart has not shown that Estill lacked such control.

Indeed, Estill clearly had authority to terminate Casias, because he was the person who actually fired Casias. *See* R. 1–3 (Estill Decl. at 4) (Page ID # 37) ("I was directed ... to terminate Plaintiff's employment for failing his drug test."). Accordingly, Estill is not like the human resources assistant in *Urbanski* who neither made nor had the authority to make the challenged termination decision. *See* 2000 WL 33421411, at *4. Similarly, Estill is not akin to the "receptionist or secretary who typed the termination letter" in the district court's hypothetical. *Casias v. Wal–Mart Stores Inc.,* 764 F.Supp.2d 914, 920 (W.D.Mich.2011). A supervisor who fires ***439** an employee at the direction of upper management is different from a co-worker who informs the employee of the decision or a secretary who types the termination letter. At the least, Michigan courts have not ruled on whether this distinction is relevant for purposes of establishing liability, and the conclusion that it is relevant is reasonable.

Ultimately, too many questions remain unanswered regarding Estill's role in Casias's termination to conclude that no reasonable possibility exists that Estill could be liable as a participant in the termination. We do not know if Estill informed Wal–Mart of the drug test results or if Estill was told of the results at the same time he was told to fire Casias.[2] We do not know if Estill took any action pursuant to Wal–Mart's directive to fire Casias other than telling Casias that he was fired; we do not know, for example, whether Estill removed Casias from the payroll (or instructed human resources to do so) or performed other tasks implementing the termination decision.[3] These are questions that could be answered in the course of discovery.

[2] Federal district courts in Michigan are divided on whether a supervisor's "informational input" can subject him to liability for an unlawful employment action, *compare Young v. Bailey Corp.,* 913 F.Supp. 547, 551 (E.D.Mich.1996) (liability), *with Yanakeff v. Signature XV,* 822 F.Supp. 1264, 1266 (E.D.Mich.1993) (no liability), and the Michigan courts have not addressed the issue.

[3] The district court repeatedly asserts that Estill simply communicated Wal–Mart's termination decision to Casias, but this is not an established fact. As noted above, Estill's own declaration states that Wal–Mart "directed [Estill] to terminate Plaintiff's employment." R. 1–3 (Estill Decl. at 4) (Page ID # 37).

It is not clear whether Casias could prove that Estill participated in the allegedly unlawful conduct, but the claim is sufficiently "colorable" to defeat an accusation of fraudulent joinder and to mandate remand to state court. Therefore, I respectfully dissent.

All Citations

350 P.3d 849
Supreme Court of Colorado.

Brandon COATS, Petitioner
v.
DISH NETWORK, LLC, Respondent.

Supreme Court Case No. 13SC394
|
June 15, 2015

Synopsis
Background: Terminated employee brought employment discrimination action against employer, alleging that his termination based on his state-licensed use of medical marijuana violated the lawful activities statute, which made it an unfair and discriminatory labor practice to discharge an employee based on the employee's lawful outside-of-work activities. The District Court, Arapahoe County, Elizabeth B. Volz, J., dismissed the action for failure to state a claim. Employee appealed, and the Court of Appeals, Davidson, C.J., 303 P.3d 147, affirmed in relevant part. Employee petitioned for review.

Holdings: The Supreme Court, Eid, J., held that:

[1] an activity such as medical marijuana use that is unlawful under federal law is not a "lawful" activity under lawful activities statute, and

[2] employee could be terminated for his use of medical marijuana in accordance with the Medical Marijuana Amendment of state constitution.

Affirmed.

Certiorari to the Colorado Court of Appeals, Colorado Court of Appeals Case Nos. 12CA595 & 12CA1704

Attorneys and Law Firms

Attorneys for Petitioner: The Evans Firm, LLC, Michael D. Evans, Denver, Colorado, Thomas K. Carberry, Thomas Karel Carberry, Denver, Colorado, Campbell Law, LLC, John E. Campbell, St. Louis, Missouri, Wolf Legal, PC, Adam B. Wolf, San Francisco, California

Attorneys for Respondent: Martinez Law Group, P.C., Meghan W. Martinez, Ann Christoff Purvis, Elizabeth Imhoff Mabey, Denver, Colorado

***850** Attorneys for Amicus Curiae State of Colorado: Colorado Department of Law, Cynthia H. Coffman, Attorney General, David C. Blake, Deputy Attorney General, Michael Francisco, Assistant Solicitor General, Michelle Brissette Miller, Assistant Attorney General, Denver, Colorado

Attorneys for Amicus Curiae Colorado Mining Association: Jackson Kelly PLLC, Laura E. Beverage, Meredith A. Kapushion, Denver, Colorado, Ryley Carlock & Applewhite, Michael D. Moberly, Charitie L. Hartsig, Phoenix, Arizona

Attorneys for Amicus Curiae Colorado Civil Justice League: Husch Blackwell LLP, Christopher L. Ottele, Mary H. Stuart, Carrie Claiborne, Denver, Colorado

Attorney for Amicus Curiae Colorado Defense Lawyers Association: Hall & Evans, L.L.C., Andrew D. Ringel, Denver, Colorado

Attorneys for Amicus Curiae Colorado Plaintiff Employment Lawyers Association: Ryan Law Firm, LLC, Kimberlie K. Ryan, Denver, Colorado

Attorney for Amicus Curiae Patient and Caregiver Rights Litigation Project: Springer and Steinberg, P.C., Andrew B. Reid, Denver, Colorado

En Banc

Opinion

JUSTICE EID delivered the Opinion of the Court.

¶ 1 This case requires us to determine whether the use of medical marijuana in compliance with Colorado's Medical Marijuana Amendment, Colo. Const. art. XVIII, § 14, but in violation of federal law, is a "lawful activity" under section 24–34–402.5, C.R.S. (2014), Colorado's "lawful activities statute." This statute generally makes it an unfair and discriminatory labor practice to discharge an employee based on the employee's "lawful" outside-of-work activities. § 24–34–402.5(1).

¶ 2 Here, petitioner Brandon Coats claims respondent Dish Network, LLC ("Dish") violated section 24–34–402.5 by discharging him due to his state-licensed use of medical marijuana at home during nonworking hours. He argues that the Medical Marijuana Amendment makes such use "lawful" for purposes of

24–34–402.5, notwithstanding any federal laws prohibiting medical marijuana use. The trial court dismissed Coats's complaint for failure to state a claim after finding that medical marijuana use is not "lawful" under Colorado state law. Coats appealed, and the court of appeals affirmed.

¶ 3 In a split decision, the majority of the court of appeals held that Coats did not state a claim for relief because medical marijuana use, which is prohibited by federal law, is not a "lawful activity" for purposes of section 24–34–402.5. *Coats v. Dish Network, LLC*, 2013 COA 62, ¶ 23, 303 P.3d 147, 152. In dissent, Judge Webb would have held that section 24–34–402.5 does protect Coats's medical marijuana use, because the term "lawful" as used in the statute refers only to Colorado state law, under which medical marijuana use is "at least lawful." *Id.* at ¶ 56, 303 P.3d at 157 (Webb, J., dissenting).

¶ 4 We granted certiorari and now affirm. The term "lawful" as it is used in section 24–34–402.5 is not restricted in any way, and we decline to engraft a state law limitation onto the term. Therefore, an activity such as medical marijuana use that is unlawful under federal law is not a "lawful" activity under section 24–34–402.5. Accordingly, we affirm the opinion of the court of appeals.

I.

¶ 5 We take the following from the complaint. Brandon Coats is a quadriplegic and has been confined to a wheelchair since he was a teenager. In 2009, he registered for and obtained a state-issued license to use medical marijuana to treat painful muscle spasms caused by his quadriplegia. Coats consumes medical marijuana at home, after work, and in accordance with his license and Colorado state law.

¶ 6 Between 2007 and 2010, Coats worked for respondent Dish as a telephone customer service representative. In May 2010, Coats tested positive for tetrahydrocannabinol ("THC"), a component of medical marijuana, during a random drug test. Coats informed Dish that he was a registered medical marijuana patient and planned to continue using ***851** medical marijuana. On June 7, 2010, Dish fired Coats for violating the company's drug policy.

¶ 7 Coats then filed a wrongful termination claim against Dish under section 24–34–402.5, which generally prohibits employers from discharging an employee based on his engagement in "lawful activities" off the premises of the employer during nonworking hours. § 24–34–402.5(1). Coats contended that Dish violated the statute by terminating him based on his outside-of-work medical marijuana use, which he argued was "lawful" under the Medical Marijuana Amendment and its implementing legislation.

¶ 8 Dish filed a motion to dismiss, arguing that Coats's medical marijuana use was not "lawful" for purposes of the statute under either federal or state law.

¶ 9 The trial court dismissed Coats's claim. It rejected Coats's argument that the Medical Marijuana Amendment made his use a "lawful activity" for purposes of section 24–34–402.5. Instead the court found that the Amendment provided registered patients an affirmative defense to state criminal prosecution without making their use of medical marijuana a "lawful activity" within the meaning of section 24–34–402.5. As such, the trial court concluded that the statute afforded no protection to Coats and dismissed the claim without examining the federal law issue.

¶ 10 On appeal, Coats again argued that Dish wrongfully terminated him under section 24–34–402.5 because his use of medical marijuana was "lawful" under state law. Dish likewise reiterated that it did not violate section 24–34–402.5 because medical marijuana use remains prohibited under federal law.

¶ 11 In a split decision, the court of appeals affirmed based on the prohibition of marijuana use under the federal Controlled Substances Act, 21 U.S.C. § 844(a) (2012) (the "CSA"). Looking to the plain language of section 24–34–402.5, the majority found that the term "lawful" means "that which is 'permitted by law.' " *Coats*, ¶ 13, 303 P.3d at 150. Applying that plain meaning, the majority reasoned that to be "lawful" for purposes of section 24–34–402.5, activities that are governed by both state and federal law must "be permitted by, and not contrary to, both state and federal law." *Id.* at ¶ 14, 303 P.3d at 151. Given that the federal CSA prohibits all marijuana use, the majority concluded that Coats's conduct was not "lawful activity" protected by the statute. The majority therefore affirmed the trial court's decision on different grounds, not reaching the question of whether the state constitutional amendment created a constitutional right for registered patients to use medical marijuana or an affirmative defense to prosecution for such use. *Coats*, ¶ 23, 303 P.3d at 152.

¶ 12 In dissent, Judge Webb argued that the term "lawful" must be interpreted according to state, rather than federal, law. He argued that the majority's interpretation failed to

effectuate the purpose of the statute by improperly narrowing the scope of the statute's protection. *Id.* at ¶ 47, 303 P.3d at 156 (Webb, J., dissenting). Finding that the Medical Marijuana Amendment made state-licensed medical marijuana use "at least lawful," Judge Webb concluded that Coats's use should be protected by the statute. *Id.* at ¶ 56, 303 P.3d at 157 (Webb, J., dissenting).

[1]¶ 13 We granted review of the court of appeals' opinion[1] and now affirm. The term "lawful" as it is used in section 24–34–402.5 is not restricted in any way, and we decline to engraft a state law limitation onto the term. Therefore, an activity such as medical marijuana use that is unlawful under federal law is not a "lawful" activity under section 24–34–402.5. Accordingly, we affirm the opinion of the court of appeals.

[1] We granted certiorari to review the following issues:

1. Whether the Lawful Activities Statute, section 24–34–402.5, protects employees from discretionary discharge for lawful use of medical marijuana outside the job where the use does not affect job performance.
2. Whether the Medical Marijuana Amendment makes the use of medical marijuana "lawful" and confers a right to use medical marijuana to persons lawfully registered with the state.

***852 II.**

¶ 14 We review de novo the question of whether medical marijuana use prohibited by federal law is a "lawful activity" protected under section 24–34–402.5. *DuBois v. People*, 211 P.3d 41, 43 (Colo.2009).

¶ 15 The "lawful activities statute" provides that "[i]t shall be a discriminatory or unfair employment practice for an employer to terminate the employment of any employee due to that employee's engaging in any *lawful activity* off the premises of the employer during nonworking hours" unless certain exceptions apply. § 24–34–402.5(1) (emphasis added). An employee discharged in violation of this provision may bring a civil action for damages, including lost wages or benefits. § 24–34–402.5(2)(a).

[2]¶ 16 By its terms the statute protects only "lawful" activities. However, the statute does not define the term "lawful." Coats contends that the term should be read as limited to activities lawful under state law. We disagree.

[3] [4]¶ 17 In construing undefined statutory terms, we look to the language of the statute itself "with a view toward giving the statutory language its commonly accepted and understood meaning." *People v. Schuett*, 833 P.2d 44, 47 (Colo.1992). We have construed the term "lawful" once before and found that its "generally understood meaning" is "in accordance with the law or legitimate." *See id.* (citing *Webster's Third New International Dictionary* 1279 (1986)). Similarly, courts in other states have construed "lawful" to mean "authorized by law and not contrary to, nor forbidden by law." *Hougum v. Valley Memorial Homes*, 574 N.W.2d 812, 821 (N.D.1998) (defining "lawful" as used in similar lawful activities provision); *In re Adoption of B.C.H.*, 22 N.E.3d 580, 585 (Ind.2014) ("Upon our review of the plain and ordinary meaning of 'lawful custody,' ... 'lawful' means 'not contrary to law.' "). We therefore agree with the court of appeals that the commonly accepted meaning of the term "lawful" is "that which is 'permitted by law' or, conversely, that which is "not contrary to, or forbidden by law." *Coats*, ¶ 13, 303 P.3d at 150.

¶ 18 We still must determine, however, whether medical marijuana use that is licensed by the State of Colorado but prohibited under federal law is "lawful" for purposes of section 24–34–402.5. Coats contends that the General Assembly intended the term "lawful" here to mean "lawful under Colorado state law," which, he asserts, recognizes medical marijuana use as "lawful." *Coats*, ¶ 6, 303 P.3d at 149. We do not read the term "lawful" to be so restrictive. Nothing in the language of the statute limits the term "lawful" to state law. Instead, the term is used in its general, unrestricted sense, indicating that a "lawful" activity is that which complies with applicable "law," including state and federal law. We therefore decline Coats's invitation to engraft a state law limitation onto the statutory language. *See State Dep't of Revenue v. Adolph Coors Co.*, 724 P.2d 1341, 1345 (Colo.1986) (declining to read a restriction into unrestricted statutory language); *Turbyne v. People*, 151 P.3d 563, 567 (Colo.2007) (stating that "[w]e do not add words to the statute").

¶ 19 Coats does not dispute that the federal Controlled Substances Act prohibits medical marijuana use. *See* 21 U.S.C. § 844(a). The CSA lists marijuana as a Schedule I substance, meaning federal law designates it as having no medical accepted use, a high risk of abuse, and a lack of accepted safety for use under medical supervision. *Id.* at § 812(b)(1)(A)–(C). This makes the use, possession, or manufacture of marijuana a federal criminal offense, except where used for federally-approved research projects. *Id.* at § 844(a); *see also Gonzales v. Raich*, 545 U.S. 1, 14, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005). There is no exception for marijuana use for medicinal purposes,

or for marijuana use conducted in accordance with state law. 21 U.S.C. § 844(a); *see also Gonzales*, 545 U.S. at 29, 125 S.Ct. 2195 (finding that "[t]he Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail," including in the area of marijuana regulation).[2] ***853** Coats's use of medical marijuana was unlawful under federal law and thus not protected by section 24–34–402.5.

[2] The Department of Justice has announced that it will not prosecute cancer patients or those with debilitating conditions who use medical marijuana in accordance with state law. Similarly, in December 2014, Congress passed the Consolidated and Further Continuing Appropriations Act that prohibited the Department of Justice from using funds made available through the Act to prevent Colorado and states with similar medical marijuana laws from "implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana." Consolidated and Further Continuing Appropriations Act, 2015, Pub. Law No. 113–235, § 538, 128 Stat. 2130, 2217 (2015). However, marijuana is still a Schedule I substance, and no medical marijuana exception yet exists in the CSA. As such, medical marijuana use remains prohibited under the CSA.

¶ 20 Echoing Judge Webb's dissent, Coats argues that because the General Assembly intended section 24–34–402.5 to broadly protect employees from discharge for outside-of-work activities, we must construe the term "lawful" to mean "lawful under Colorado law." *Coats*, ¶¶ 46–47, 303 P.3d at 156 (Webb, J., dissenting). In this case, however, we find nothing to indicate that the General Assembly intended to extend section 24–34–402.5's protection for "lawful" activities to activities that are unlawful under federal law. In sum, because Coats's marijuana use was unlawful under federal law, it does not fall within section 24–34–402.5's protection for "lawful" activities.

¶ 21 Having decided this case on the basis of the prohibition under federal law, we decline to address the issue of whether Colorado's Medical Marijuana Amendment deems medical marijuana use "lawful" by conferring a right to such use.

III.

¶ 22 For the reasons stated above, we affirm the decision of the court of appeals.

JUSTICE MÁRQUEZ does not participate.

All Citations

350 P.3d 849, 99 Empl. Prac. Dec. P 45,330, 165 Lab.Cas. P 61,600, 40 IER Cases 419, 31 A.D. Cases 1289, 2015 CO 44

End of Document

348 Or. 159
Supreme Court of Oregon.
En Banc.

EMERALD STEEL FABRICATORS, INC.,
Petitioner on Review,
v.
BUREAU OF LABOR AND INDUSTRIES,
Respondent on Review.

(BOLI 3004; CA A130422; SC S056265).
|
Argued and Submitted March 6, 2009.
|
Decided April 15, 2010.

Synopsis

Background: Employer sought review of decision of Bureau of Labor and Industries (BOLI), concluding that employer engaged in disability discrimination when it discharged employee due to employee's medical marijuana use. The Court of Appeals, 220 Or.App. 423, 186 P.3d 300, affirmed. Employer filed petition for review.

Holdings: The Supreme Court, Kistler, J., held that:

[1] employer preserved for review claim that state law did not require accommodation of employee's medical marijuana use because marijuana possession is unlawful under federal law;

[2] employee currently engaged in the illegal use of drugs is not entitled to reasonable accommodation;

[3] provision of Oregon Medical Marijuana Act affirmatively authorizing the use of medical marijuana was preempted by Federal Controlled Substances Act, which explicitly prohibited marijuana use without regard to medicinal purpose; and

[4] exclusion from the definition of "illegal use of drugs" for the "use of a drug taken under supervision of a licensed health care professional" refers to those medical and research uses that the Controlled Substances Act authorizes.

Reversed.

Walters, J., dissented and filed opinion, in which Durham, J., joined.

West Codenotes

Preempted
West's Or.Rev. Stat. Ann. § 475.306(1)
****519** On review from the Court of Appeals.*

* Appeal from Revised Order on Reconsideration dated July 13, 2006, of the Bureau of Labor and Industries. 220 Or.App. 423, 186 P.3d 300 (2008).

Attorneys and Law Firms

Terence J. Hammons, of Hammons & Mills, Eugene, argued the cause and filed the brief for petitioner on review.

Janet A. Metcalf, Assistant Attorney General, Salem, argued the cause and filed the brief for respondent on review. With her on the brief were John R. Kroger, Attorney General, and Erika L. Hadlock, Acting Solicitor General.

Paula A. Barran, of Barran Liebman LLP, Portland, filed the brief for amicus curiae Associated Oregon Industries.

James N. Westwood, of Stoel Rives LLP, Portland, filed the brief for amici curiae Pacific Legal Foundation and National Federation of Independent Business. With him on the brief was Deborah J. La Fetra.

Opinion

KISTLER, J.

***161** The Oregon Medical Marijuana Act authorizes persons holding a registry identification card to use marijuana for medical purposes. ORS 475.306(1). It also exempts those persons from state criminal liability for ****520** manufacturing, delivering, and possessing marijuana, provided that certain conditions are met. ORS 475.309(1). The Federal Controlled Substances Act, 21 U.S.C. § 801 *et seq.*, prohibits the manufacture, distribution, dispensation, and possession of marijuana even when state law authorizes its use to treat medical

conditions. *Gonzales v. Raich*, 545 U.S. 1, 29, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005); *see United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 486, 121 S.Ct. 1711, 149 L.Ed.2d 722 (2001) (holding that there is no medical necessity exception to the federal prohibition against manufacturing and distributing marijuana).

The question that this case poses is how those state and federal laws intersect in the context of an employment discrimination claim; specifically, employer argues that, because marijuana possession is unlawful under federal law, even when used for medical purposes, state law does not require an employer to accommodate an employee's use of marijuana to treat a disabling medical condition. The Court of Appeals declined to reach that question, reasoning that employer had not preserved it. *Emerald Steel Fabricators, Inc. v. BOLI*, 220 Or.App. 423, 186 P.3d 300 (2008). We allowed employer's petition for review and hold initially that employer preserved the question that it sought to raise in the Court of Appeals. We also hold that, under Oregon's employment discrimination laws, employer was not required to accommodate employee's use of medical marijuana. Accordingly, we reverse the Court of Appeals decision.

Since 1992, employee has experienced anxiety, panic attacks, nausea, vomiting, and severe stomach cramps, all of which have substantially limited his ability to eat. Between January 1996 and November 2001, employee used a variety of prescription drugs in an attempt to alleviate that condition. None of those drugs proved effective for an extended period of time, and some had negative effects. In 1996, ***162** employee began using marijuana to self-medicate his condition.

In April 2002, employee consulted with a physician for the purpose of obtaining a registry identification card under the Oregon Medical Marijuana Act. The physician signed a statement that employee has a "debilitating medical condition" and that "[m]arijuana may mitigate the symptoms or effects of this patient's condition." The statement added, however, "This is not a prescription for the use of medical marijuana." The statement that employee's physician signed tracks the terms of the Oregon Medical Marijuana Act. That act directs the state to issue registry identification cards to persons when a physician states that "the person has been diagnosed with a debilitating medical condition and that the medical use of marijuana may mitigate the symptoms or effects" of that condition. ORS 475.309(2).[1] No prescription is required as a prerequisite for obtaining a registry identification card. *See id.*

[1] The 2001 version of the applicable statutes was in effect at the time of the events that gave rise to this proceeding. Since 2001, the legislature has amended those statutes but not in ways that affect our decision, and we have cited to the 2009 version of the statutes.

Based on the physician's statement, employee obtained a registry identification card in June 2002, which he renewed in 2003.[2] That card authorized employee to "engage in * * * the medical use of marijuana" subject to certain restrictions. ORS 475.306(1). Possession of the card also exempted him from state criminal prosecution for the possession, distribution, and manufacture of marijuana, provided that he met certain conditions. ORS 475.309(1).

[2] ORS 475.309(7)(a)(C) requires a person possessing a registry identification card to submit annually "[u]pdated written documentation from the cardholder's attending physician of the person's debilitating medical condition and that the medical use of marijuana may mitigate the symptoms or effects" of that condition. If the person fails to do so, the card "shall be deemed expired." ORS 475.309(7)(b).

Employer manufactures steel products. In January 2003, employer hired employee on a temporary basis as a drill press operator. While working for employer, employee used medical marijuana one to three times per day, although not at work. Employee's work was satisfactory, and employer was considering hiring him on a permanent basis. ****521** Knowing ***163** that he would have to pass a drug test as a condition of permanent employment, employee told his supervisor that he had a registry identification card and that he used marijuana for a medical problem; he also showed his supervisor documentation from his physician. In response to a question from his supervisor, employee said that he had tried other medications but that marijuana was the most effective way to treat his condition. Neither employee's supervisor nor anyone else in management engaged in any other discussion with employee regarding alternative treatments for his condition. One week later, the supervisor discharged employee.

Two months later, employee filed a complaint with the Bureau of Labor and Industries (BOLI), alleging that employer had discriminated against him in violation of ORS 659A.112. That statute prohibits discrimination against an otherwise qualified person because of a disability and requires, among other things, that employers "make reasonable accommodation" for a person's disability unless doing so would impose an

undue hardship on the employer. ORS 659A.112(2)(e). Having investigated employee's complaint, BOLI filed formal charges against employer, alleging that employer had discharged employee because of his disability in violation of ORS 659A.112(2)(c) and (g) and that employer had failed to reasonably accommodate employee's disability in violation of ORS 659A.112(2)(e) and (f). Employer filed an answer and raised seven affirmative defenses.

After hearing the parties' evidence, an administrative law judge (ALJ) issued a proposed order in which he found that employee was a disabled person within the meaning of ORS chapter 659A but that employer had not discharged employee because of his disability. The ALJ found instead that employer had discharged employee because he used marijuana and ruled that discharging employee for that reason did not violate ORS 659A.112(2)(c) or (g). The ALJ went on to rule, however, that employer had violated ORS 659A.112(2)(e) and (f), which prohibit an employer from failing to reasonably accommodate the "known physical or mental limitations of an otherwise qualified disabled person," and from denying employment opportunities to an otherwise ***164** qualified disabled person when the denial is based on the failure "to make reasonable accommodation to the physical or mental impairments of the employee."

Among other things, the ALJ ruled that employer's failure to engage in a "meaningful interactive process" with employee, standing alone, violated the obligation set out in ORS 659A.112(2)(e) and (f) to reasonably accommodate employee's disability. The ALJ also found that employee had suffered damages as a result of those violations, and the commissioner of BOLI issued a final order that adopted the ALJ's findings in that regard.

[1] Employer sought review of the commissioner's order in the Court of Appeals. As we understand employer's argument in the Court of Appeals, it ran as follows: Oregon law requires that ORS 659A.112 be interpreted consistently with the federal Americans with Disabilities Act (ADA), 42 USC § 12101 *et seq.* Section 12114(a) of the ADA provides that the protections of the ADA do not apply to persons who are currently engaged in the illegal use of drugs, and the federal Controlled Substances Act prohibits the possession of marijuana without regard to whether it is used for medicinal purposes. It follows, employer reasoned, that the ADA does not apply to persons who are currently engaged in the use of medical marijuana. Like the ADA, ORS 659A.124 provides that the protections of ORS 659A.112 do not apply to persons who are currently engaged in the illegal use of drugs. Employer reasoned that, if ORS 659A.112 is interpreted consistently with the ADA, then ORS 659A.112 also does not apply to persons who are currently engaged in medical marijuana use. Employer added that, in any event, the United States Supreme Court's opinion in *Raich* and the Supremacy Clause required that interpretation.

The Court of Appeals did not reach the merits of employer's argument. It concluded that employer had not presented that argument to the agency and thus had not preserved it. Accordingly, we begin with the question whether employer preserved the issues ****522** before BOLI that it sought to raise in the Court of Appeals.

Employer raised seven affirmative defenses in response to BOLI's complaint. The fifth affirmative defense alleged:

> ***165** "Oregon law prescribes that ORS 659A.112 be construed to the extent possible in a manner that is consistent with any similar provisions of the Federal Americans with Disabilities Act of 1990, as amended. That Act does not permit the use of marijuana because marijuana is an illegal drug under Federal Law."

That affirmative defense is broad enough to encompass the argument that employer made in the Court of Appeals. To be sure, employer's fifth affirmative defense does not refer specifically to ORS 659A.124. However, it alleges that the ADA does not apply to persons who use marijuana, a proposition that necessarily depends on both 42 USC § 12114(a), the federal counterpart to ORS 659A.124, and the Controlled Substances Act. And the fifth affirmative defense also states that ORS 659A.112 should be construed in the same manner as the ADA. Although employer could have been more specific, its fifth affirmative defense is sufficient to raise the statutory issue that it sought to argue in the Court of Appeals.[3]

[3] BOLI points to nothing in its rules that suggests that more specificity was required. *Cf.* OAR 839–050–0130 (providing only that affirmative defenses must be raised or waived).

Ordinarily, we would expect that employer would have developed the legal arguments in support of its fifth affirmative defense more fully at the agency hearing. However, the Court of Appeals issued its decision in *Washburn v. Columbia Forest Products, Inc.*, 197 Or.App. 104, 104 P.3d 609 (2005), two weeks before the hearing in this case, and employer concluded that the reasoning in *Washburn* foreclosed its fifth affirmative defense. The Court of Appeals held in *Washburn* that an employer's failure to accommodate an employee's use of

medical marijuana violated ORS 659A.112. In reaching that holding, the Court of Appeals decided two propositions that bore on the validity of employer's fifth affirmative defense. First, it reasoned that the requirement in ORS 659A.139 to interpret ORS 659A.112 consistently with the ADA does not require absolute symmetry between state and federal law. *Id.* at 109–10, 104 P.3d 609. Second, it held that, as a matter of state law, the employee's medical use of marijuana was "not unlawful" for the purposes of a federal statute that prohibits the use of illegal drugs in the workplace. *Id.* at 114–15, 104 P.3d 609. The court noted that the question "[w]hether medical use of marijuana is unlawful under federal law is an open question" ***166** and that the United States Supreme Court had granted the government's petition for certiorari in *Raich* to decide that question. *Id.* at 115 n. 8, 104 P.3d 609.

At the hearing in this case, employer told the ALJ that five of its affirmative defenses (including the fifth affirmative defense) were "foreclosed by the *Washburn* decision" but that it was "not withdrawing them." Employer did not explain the basis for that position. We note, however, that the Court of Appeals' conclusion in *Washburn* that ORS 659A.139 does not require absolute symmetry between the state and federal antidiscrimination statutes and its conclusion that medical marijuana use is "not unlawful" under state law effectively foreclosed reliance on ORS 659A.139 and ORS 659A.124 as a basis for employer's fifth affirmative defense. There would be little point in arguing before the ALJ that employee was currently engaged in the illegal use of drugs if, as the Court of Appeals had just stated in *Washburn*, the use of medical marijuana is not illegal.[4] The ALJ issued a proposed order in which it ruled that the Court of Appeals decision in *Washburn* controlled, among other things, employer's fifth affirmative defense.

[4] To be sure, the Court of Appeals reserved the question in *Washburn* whether the use of medical marijuana is unlawful under federal law, but that did not detain it from holding that the employer in that case had an obligation under ORS 659A.112 to accommodate the employee's use of medical marijuana. Given *Washburn*'s holding, employer reasonably conceded its controlling effect until, as noted below, the Supreme Court issued its decision in *Raich.*

****523** After the ALJ filed his proposed order, the United States Supreme Court issued its decision in *Raich* and held that Congress had acted within its authority under the Commerce Clause in prohibiting the possession, manufacture, and distribution of marijuana even when state law authorizes its use for medical purposes. 545 U.S. at 33, 125 S.Ct. 2195. *Raich* addressed the question that the Court of Appeals had described in *Washburn* as open—whether using marijuana, even for medical purposes, is unlawful under federal law. Employer filed a supplemental exception based on *Raich* and alternatively a request to reopen the record to consider *Raich.* Employer argued that, as a result of *Raich*, "states may not authorize the use of marijuana for medicinal purposes" and that "[t]he impact of this decision is that ***167** [employer] should prevail on its Fourth and Fifth Affirmative Defenses."

BOLI responded that the ALJ should not reopen the record. It reasoned that *Raich* did not invalidate Oregon's medical marijuana law and that, in any event, employer could have raised a preemption argument before the Court issued its decision in *Raich.* Employer replied that, as it read *Raich*, the "Supreme Court has ruled that legalization of marijuana is preempted by federal law. This obviously invalidates the Oregon Medical Marijuana Act." Employer also explained that it had raised this issue in its fourth and fifth affirmative defenses, which "recite[d] that marijuana is an illegal drug under federal law, and that state law deferred to federal law." After considering the parties' arguments, the ALJ allowed employer's motion to reopen the record, stating that "[t]he forum will consider the Supreme Court's ruling in *Raich* to the extent that it is relevant to [employer's] case." Later, the Commissioner ruled that the Controlled Substances Act, which was at issue in *Raich*, did not preempt the Oregon Medical Marijuana Act.

As we read the record, employer took the position before the agency that, like the protections of the federal ADA, the protections of ORS 659A.112 do not apply to a person engaged in the use of illegal drugs, a phrase that, as a result of controlling federal law, includes the use of medical marijuana. We conclude that employer's arguments were sufficient to preserve the issue that it sought to raise on judicial review in the Court of Appeals. To be sure, employer's fifth affirmative defense, as pleaded, turned solely on a question of statutory interpretation. Employer did not raise the preemption issue or argue that federal law required a particular reading of Oregon's statutes until employer asked the ALJ to reopen the record to consider *Raich.* Perhaps the ALJ could have declined to reopen the record. However, once the ALJ chose to reopen the record and the Commissioner chose to address employer's preemption arguments based on *Raich*, then employer's federal preemption arguments were also properly before the agency.[5]

[5] After the Commissioner issued his final order in this case, this court reversed the Court of Appeals decision

in *Washburn. Washburn v. Columbia Forest Products, Inc.*, 340 Or. 469, 480, 134 P.3d 161 (2006). This court held that the employee in *Washburn* was not a disabled person within the meaning of ORS chapter 659A. *Id.* at 479, 134 P.3d 161. Given that holding, this court did not reach the other issues that the Court of Appeals had addressed in *Washburn.* After this court's decision in *Washburn,* the commissioner withdrew the final order and issued a revised order on reconsideration, adhering to his earlier resolution of employer's affirmative defenses in this case.

***168** **[2]** As noted, the Court of Appeals reached a different conclusion regarding preservation, and we address its reasoning briefly. The Court of Appeals reasoned that, in telling the ALJ that *Washburn* foreclosed its affirmative defenses, employer adopted the specific defenses that the employer in *Washburn* had asserted and that employer was now limited to those defenses. 220 Or.App. at 437, 186 P.3d 300. The difficulty, the Court of Appeals explained, was that the statutory issues that employer had raised in its affirmative defenses and sought to raise on judicial review differed from the issues that the employer had raised in *Washburn. Id.*

In our view, the Court of Appeals misperceived the import of what employer told the ALJ. Employer reasonably acknowledged that the reasoning in *Washburn* controlled the related but separate defenses that it was ****524** raising in this case. Employer did not say that it was advancing the same issues that the employer had asserted in *Washburn,* and the Court of Appeals erred in holding otherwise.

The Court of Appeals also concluded that employer had not preserved its argument regarding the preemptive effect of the Controlled Substances Act, as interpreted in *Raich. Emerald Steel,* 220 Or.App. at 437–38, 186 P.3d 300. It noted that, on judicial review, employer argued that federal law required its interpretation of Oregon's antidiscrimination statutes while it had argued before the agency that federal law preempted the Oregon Medical Marijuana Act. *Id.* We read the record differently. As explained above, employer made both arguments before the agency.[6]

6 As noted, employer moved to reopen the record on the ground that, as a result of *Raich,* "states may not authorize the use of marijuana for medicinal purposes" and that "[t]he impact of this decision is that [employer] should prevail on its Fourth and Fifth Affirmative Defenses." Employer thus told the agency that the Controlled Substances Act, as interpreted in *Raich,* compelled its interpretation of Oregon's antidiscrimination statutes. Additionally, in response to BOLI's arguments, employer contended that the Controlled Substances Act preempted the Oregon Medical Marijuana Act.

***169** Having concluded that employer preserved the issues it sought to raise on judicial review, we turn to the merits of those issues.[7] Employer's statutory argument begins with ORS 659A.124(1), which provides that "the protections of ORS 659A.112 do not apply to any * * * employee who is currently engaging in the illegal use of drugs if the employer takes action based on that conduct."[8] It follows, employer reasons, that it had no obligation under ORS 659A.112(2)(e) and (f) to reasonably accommodate employee's medical marijuana use. In responding to that argument on the merits, BOLI does not dispute that employee was currently engaged in the use of medical marijuana, nor does it dispute that employer discharged employee for that reason. Rather, BOLI advances two arguments why ORS 659A.124 does not support employer's position.

7 We note that both California and Washington have considered whether their state medical marijuana laws give medical marijuana users either a claim under California's fair employment law or an implied right of action under Washington law against an employer that discharges or refuses to hire a person for off-work medical marijuana use. *See Roe v. TeleTech Customer Care Management,* 152 Wash.App. 388, 216 P.3d 1055 (2009); *Ross v. RagingWire Telecommunications, Inc.*, 42 Cal.4th 920, 70 Cal.Rptr.3d 382, 174 P.3d 200 (2008). Both the California and Washington courts have held that, in enacting their states' medical marijuana laws, the voters did not intend to affect an employer's ability to take adverse employment actions based on the use of medical marijuana. *Roe,* 216 P.3d at 1058–61; *Ross,* 70 Cal.Rptr.3d 382, 174 P.3d at 204. Accordingly, in both Washington and California, employers do not have to accommodate their employees' off-site medical marijuana use. We reach the same conclusion, although our analysis differs because Oregon has chosen to write its laws differently.

8 ORS 659A.124 lists exceptions to that rule, none of which applies here. *See* ORS 659A.124(2) (recognizing exceptions for persons who either are participating in or have successfully completed a supervised drug rehabilitation program and are no longer engaging in the illegal use of drugs).

[3] As we understand BOLI's first argument, it contends that, because the commissioner found that employer had

violated ORS 659A.112(2)(e) and (f) by failing to engage in a "meaningful interactive process," ORS 659A.124 is inapposite. We reach precisely the opposite conclusion. The commissioner explained that engaging in a "meaningful interactive process" is the "mandatory first step in the process of reasonable accommodation" that ORS 659A.112(2)(e) and (f) require. However, ORS 659A.124 provides that "the protections of ORS 659A.112 do not apply" to an employee who is currently engaged in the illegal use of drugs, if the employer ***170** takes an adverse action based on that use. Under the plain terms of ORS 659A.124, if medical marijuana use is an illegal use of drugs within the meaning of ORS 659A.124, then ORS 659A.124 excused employer from whatever obligation it would have had under ORS 659A.112 to engage in a "meaningful interactive process" or otherwise accommodate employee's use of medical marijuana.

BOLI advances a second, alternative argument. It argues that "employee's use of medical marijuana was entirely legal under ****525** state law" and thus not an "illegal use of drugs" within the meaning of ORS 659A.124. BOLI recognizes, as it must, that the federal Controlled Substances Act prohibits possession of marijuana even when used for medical purposes. BOLI's argument rests on the assumption that the phrase "illegal use of drugs" in ORS 659A.124 does not include uses that are legal under state law even though those same uses are illegal as a matter of federal law. BOLI never identifies the basis for that assumption; however, a state statute defines the phrase "illegal use of drugs," as used in ORS 659A.124, and we turn to that statute for guidance in resolving BOLI's second argument.

ORS 659A.122 provides, in part:

> "As used in this section and ORS 659A.124, 659A.127 and 659A.130:
>
> " * * * * *
>
> "(2) 'Illegal use of drugs' means any use of drugs, the possession or distribution of which is unlawful under state law or under the federal Controlled Substances Act, 21 U.S.C.A. 812, as amended, but does not include the use of a drug taken under supervision of a licensed health care professional, or other uses authorized under the Controlled Substances Act or under other provisions of state or federal law."[9]

[9] Before 2009, *former* ORS 659A.100(4) (2001) defined the phrase "illegal use of drugs." In 2009, the legislature renumbered that definition as ORS 659A.122(2).

The definition of "illegal use of drugs" divides into two parts. The first part defines the drugs that are included within the definition—all drugs whose use or possession is unlawful under state or federal law. Marijuana clearly falls within the ***171** first part of the definition. The second part of the definition excludes certain uses of what would otherwise be an illegal use of a drug. Two exclusions are potentially applicable here: (1) the exclusion for "uses authorized under * * * other provisions of state * * * law" and (2) the exclusion for "the use of a drug taken under supervision of a licensed health care professional." We consider each exclusion in turn.

We begin with the question whether employee's use of medical marijuana is a "us[e] authorized under * * * other provisions of state * * * law." We conclude that, as a matter of statutory interpretation, it is an authorized use. The Oregon Medical Marijuana Act affirmatively authorizes the use of medical marijuana, in addition to exempting its use from state criminal liability. Specifically, ORS 475.306(1) provides that "[a] person who possesses a registry identification card * * * may engage in * * * the medical use of marijuana" subject to certain restrictions. ORS 475.302(10), in turn, defines a registry identification card as "a document * * * that identifies a person authorized to engage in the medical use of marijuana." Reading those two subsections together, we conclude that ORS 475.306(1) affirmatively authorizes the use of marijuana for medical purposes[10] and, as a statutory matter, brings the use of medical marijuana within one of the exclusions from the "illegal use of drugs" in ORS 659A.122(2).[11]

[10] The ballot title for the Oregon Medical Marijuana Act confirms that interpretation of the act. *See State v. Gaines*, 346 Or. 160, 172, 206 P.3d 1042 (2009) (looking to legislative history to confirm text). The caption, "yes" vote result statement, and summary of the ballot title focused on the fact that the measure, if enacted, would allow permit-holders to use medical marijuana and referred to the exemption from criminal laws only at the end of the summary. Official Voters' Pamphlet, Nov 3, 1998, 148. The caption stated that the measure "[a]llows medical use of marijuana within limits; establishes permit system." The "yes" vote result statement was to the same effect, and the summary stated that current law prohibits the possession and manufacture of marijuana but that the measure "allows engaging in, assisting in, medical use of marijuana." *Id.* Only at the end of the summary did the ballot title add that the measure "excepts permit holder or applicant from marijuana criminal statutes." *Id.*

[11] The Oregon Medical Marijuana Act also exempts medical marijuana use from state criminal liability. *See* ORS 475.309(1) (excepting persons holding registry identification cards from certain state criminal prohibitions); ORS 475.319 (creating an affirmative defense to certain criminal prohibitions for persons who do not hold registry identification cards but who have complied with the conditions necessary to obtain one). Because ORS 659A.122(2) excludes from the definition of illegal use of drugs only those uses authorized by state law, the provisions of the Oregon Medical Marijuana Act that are relevant here are those provisions that affirmatively authorize the use of medical marijuana, as opposed to those provisions that exempt its use from criminal liability.

****526 *172** **[4]** Employer argues, however, that the Supremacy Clause of the United States Constitution requires that we interpret Oregon's statutes consistently with the federal Controlled Substances Act. We understand employer's point to be that, to the extent that ORS 475.306(1) affirmatively authorizes the use of medical marijuana, federal law preempts that subsection and that, without any effective state law authorizing the use of medical marijuana, employee's use of that drug was an "illegal use of drugs" within the meaning of ORS 659A.124.[12] We turn to that question and begin by setting out the general principles that govern preemption. We then discuss the federal Controlled Substances Act and finally turn to whether the Controlled Substances Act preempts the Oregon Medical Marijuana Act to the extent that state law affirmatively authorizes the use of medical marijuana.

[12] The only issue that employer's preemption argument raises is whether federal law preempts ORS 475.306(1) to the extent that it authorizes the use of medical marijuana. In holding that federal law does preempt that subsection, we do not hold that federal law preempts the other sections of the Oregon Medical Marijuana Act that exempt medical marijuana use from criminal liability. We also express no opinion on the question whether the legislature, if it chose to do so and worded Oregon's disability law differently, could require employers to reasonably accommodate disabled employees who use medical marijuana to treat their disability. Rather, our opinion arises from and is limited to the laws that the Oregon legislature has enacted.

[5] [6] [7] [8] The United States Supreme Court recently summarized the general principles governing preemption:

> "Our inquiry into the scope of a statute's pre-emptive effect is guided by the rule that ' "[t]he purpose of Congress is the ultimate touchstone" in every pre-emption case.' *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 485, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996) (quoting *Retail Clerks v. Schermerhorn,* 375 U.S. 96, 103, 84 S.Ct. 219, 11 L.Ed.2d 179 (1963)). Congress may indicate a pre-emptive intent through a statute's express language or through its structure and purpose. *See Jones v. Rath Packing Co.,* 430 U.S. 519, 525, 97 S.Ct. 1305, 51 L.Ed.2d 604 (1977). * * * Pre-emptive intent may also be inferred if the scope of the statute indicates that Congress intended federal law to occupy the legislative field, or if there is an actual conflict between state and ***173** federal law. *Freightliner Corp. v. Myrick,* 514 U.S. 280, 287, 115 S.Ct. 1483, 131 L.Ed.2d 385 (1995).
>
> "When addressing questions of express or implied pre-emption, we begin our analysis 'with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947)."

Altria Group, Inc. v. Good, —— U.S. ——, ——, 129 S.Ct. 538, 543, 172 L.Ed.2d 398 (2008).

[9] With those principles in mind, we turn to the Controlled Substances Act. The central objectives of that act "were to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances. Congress was particularly concerned with the need to prevent the diversion of drugs from legitimate to illicit channels." *Raich,* 545 U.S. at 12–13, 125 S.Ct. 2195 (footnotes omitted). To accomplish those objectives, Congress created a comprehensive, closed regulatory regime that criminalizes the unauthorized manufacture, distribution, dispensation, and possession of controlled substances classified in five schedules. *Id.* at 13, 125 S.Ct. 2195.

The Court has explained that:

> "Schedule I drugs are categorized as such because of their high potential for abuse, lack of any accepted medical use, and absence of any accepted safety for use in medically supervised treatment. [21 U.S.C.] § 812(b)(1). These three factors, in varying gradations, are also used to categorize drugs in the other four schedules. For example, Schedule II substances also have a high potential for abuse which may

> lead to severe psychological ****527** or physical dependence, but unlike Schedule I drugs, they have a currently accepted medical use. [21 U.S.C.] § 812(b)."

Id. at 14, 125 S.Ct. 2195. Consistent with Congress's determination that the controlled substances listed in Schedule II through V have currently accepted medical uses, the Controlled Substances Act authorizes physicians to prescribe those substances for medical use, provided that they do so within the bounds of professional practice. *See United States v. Moore*, 423 U.S. 122, 142–43, 96 S.Ct. 335, 46 L.Ed.2d 333 (1975).[13] By contrast, ***174** because Schedule I controlled substances lack any accepted medical use, federal law prohibits *all* use of those drugs "with the sole exception being use of [Schedule I] drug[s] as part of a Food and Drug Administration preapproved research project." *Raich*, 545 U.S. at 14, 125 S.Ct. 2195; *see* 21 U.S.C. § 823(f) (recognizing that exception for the use of Schedule I drugs).

[13] Two subsections of the Controlled Substances Act accomplish that result. Section 823(f) directs the Attorney General to register physicians and other practitioners to dispense controlled substances listed in Schedule II through V. 21 U.S.C. § 823(f). Section 822(b) authorizes persons registered with the Attorney General to dispense controlled substances "to the extent authorized by their registration and in conformity with the other provisions of this subchapter." 21 U.S.C. § 822(b).

Congress has classified marijuana as a Schedule I drug, 21 U.S.C. § 812(c), and federal law prohibits its manufacture, distribution, and possession, 21 U.S.C. § 841(a)(1). Categorizing marijuana as a Schedule I drug reflects Congress's conclusion that marijuana "lack[s] any accepted medical use, and [that there is an] absence of any accepted safety for use in medically supervised treatment." *Raich*, 545 U.S. at 14, 125 S.Ct. 2195 (citing 21 U.S.C. § 812(b)(1)). Consistently with that classification, the Court has concluded that the Controlled Substances Act does not contain a "medical necessity" exception that permits the manufacture, distribution, or possession of marijuana for medical treatment. *Oakland Cannabis Buyers' Cooperative*, 532 U.S. at 494 and n. 7, 121 S.Ct. 1711.[14] Despite efforts to reclassify marijuana, it has remained a Schedule I drug since the enactment of the Controlled Substances Act. *See Raich*, 545 U.S. at 14–15 and n. 23, 125 S.Ct. 2195 (summarizing "considerable efforts," ultimately unsuccessful, to reschedule marijuana).

[14] The specific question in *Oakland Cannabis Buyers' Cooperative* was whether there was a medical necessity exception for manufacturing and distributing marijuana. The Court explained, however, that, "[l]est there be any confusion, we clarify that nothing in our analysis, or the statute, suggests that a distinction should be drawn between the prohibitions on manufacturing and distributing and the other prohibitions in the Controlled Substances Act." 532 U.S. at 494 n. 7, 121 S.Ct. 1711.

Section 903 of the Controlled Substances Act addresses the relationship between that act and state law. It provides:

> "No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same ***175** subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together."

21 U.S.C. § 903. Under the terms of section 903, states are free to pass laws "on the same subject matter" as the Controlled Substances Act unless there is a "positive conflict" between state and federal law "so that the two cannot consistently stand together."

When faced with a comparable preemption provision, the Court recently engaged in an implied preemption analysis to determine whether a federal statute preempted state law. *Wyeth v. Levine*, —— U.S. ——, ——, 129 S.Ct. 1187, 1196–1200, 173 L.Ed.2d 51 (2009).[15] That is, the Court asked whether ****528** there is an "actual conflict" between state and federal law. An actual conflict will exist either when it is physically impossible to comply with both state and federal law or when state law " 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Freightliner Corp.*, 514 U.S. at 287, 115 S.Ct. 1483 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941)).

[15] The provision at issue in *Wyeth* provided that the federal statute did not preempt state law unless there

was a "direct and positive" conflict between state and federal law. *Wyeth*, 129 S.Ct. at 1196. At first blush, one might think that the Court would have looked to the standard that Congress had expressly provided—whether there is a "direct and positive conflict" between the state and federal laws—to determine the extent to which federal law preempts state law. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992) (holding that the preemptive effect of a federal act is "governed entirely" by an express preemption provision). Implied preemption, however, addresses a similar issue, and the Court used an implied preemption analysis in *Wyeth* without any discussion. 129 S.Ct. at 1196–1200. Given *Wyeth*, we follow a similar course here.

The Court has applied the physical impossibility prong narrowly. *Wyeth*, 129 S.Ct. at 1199 (so stating); *id.* at 1209 (Thomas, J., concurring in the judgment).[16] For example, in ***176** *Barnett Bank v. Nelson*, 517 U.S. 25, 116 S.Ct. 1103, 134 L.Ed.2d 237 (1996), the question was whether "a federal statute that permits national banks to sell insurance in small towns pre-empts a state statute that forbids them to do so." *Id.* at 27, 116 S.Ct. 1103. Although the two statutes were logically inconsistent, the Court held that it was not physically impossible to comply with both. *Id.* at 31, 116 S.Ct. 1103. A national bank could simply refrain from selling insurance. *See Wyeth*, 129 S.Ct. at 1209 (Thomas, J., concurring in the judgment) (explaining physical impossibility test).

16 Justice Thomas noted that the Court had used different formulations to explain when it would be physically impossible to comply with both state and federal laws and questioned whether the Court had applied that standard too strictly. *Wyeth*, 129 S.Ct. at 1208–09 (opinion concurring in the judgment). In his view, the physical impossibility test is too narrow, and asking whether state law stands as an obstacle to the purposes of the federal law too amorphous. He would have asked whether the state and federal law are in direct conflict. *Id.; see* Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 260–61 (2000) (reasoning that historically and practically preemption reduces to a "logical contradiction" test).

Under that reasoning, it is not physically impossible to comply with both the Oregon Medical Marijuana Act and the federal Controlled Substances Act. To be sure, the two laws are logically inconsistent; state law authorizes what federal law prohibits. However, a person can comply with both laws by refraining from any use of marijuana, in much the same way that a national bank could comply with state and federal law in *Barnett Bank* by simply refraining from selling insurance.

Because the "physical impossibility" prong of implied preemption is "vanishingly narrow," Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 228 (2000), the Court's decisions typically have turned on the second prong of implied preemption analysis—whether state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *See Hines*, 312 U.S. at 67, 61 S.Ct. 399 (stating test). In *Barnett Bank*, for example, the Court stated, as a self-evident proposition, that a state law that prohibited national banks from selling insurance when federal law permitted them to do so would stand as an obstacle to the full accomplishment of Congress's purpose, but it then added "unless, of course, that federal purpose is to grant [national] bank[s] only a very *limited* permission, that is, permission to sell insurance *to the extent that state law also grants permission to do so*." *Barnett Bank*, 517 U.S. at 31, 116 S.Ct. 1103 (emphasis in original). Having considered the text and history of the federal statute and finding no basis for implying such a limited permission, the Court held that the state statute was preempted. *Id.* at 35–37, 116 S.Ct. 1103.

***177** The Court has reached the same conclusion when, as in this case, state law permits what federal law prohibits. *Michigan Canners & Freezers Association v. Agricultural Marketing and Bargaining Bd.*, 467 U.S. 461, 104 S.Ct. 2518, 81 L.Ed.2d 399 (1984). In *Michigan Canners*, federal law prohibited food producers' associations from interfering with an individual food producer's decision whether to bring that individual's products to the market on his or her own or to sell them through the association. *Id.* at 464–65, 104 S.Ct. 2518. Michigan law on this issue generally tracked federal law; however, Michigan law permitted food producers' associations to apply to a state board for authority ****529** to act as the exclusive bargaining agent for all producers of a particular commodity. *Id.* at 466, 104 S.Ct. 2518. When the state board gave a producer's association that authority, all producers of a commodity had to adhere to the terms of the contracts that the association negotiated with food processors, even when the producer had declined to join the association. *Id.* at 467–68, 104 S.Ct. 2518.

In considering whether federal law preempted the Michigan law, the Court held initially that it was physically possible to comply with both state and federal law. The Court reasoned that, because the "Michigan Act is cast in permissive rather than mandatory terms—an association *may*, but need not, act as exclusive bargaining representative—this is not a case in which it is

[physically] impossible for an individual to comply with both state and federal law." *Id.* at 478 n. 21, 104 S.Ct. 2518 (emphasis in original). The Court went on to conclude, however, that "because the Michigan Act authorizes producers' associations to engage in conduct that the federal Act forbids, it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Id.* at 478, 104 S.Ct. 2518 (quoting *Hines*, 312 U.S. at 67, 61 S.Ct. 399).

The preemption issue in this case is similar to the issue in *Michigan Canners* and *Barnett Bank.* In this case, ORS 475.306(1) affirmatively authorizes the use of medical marijuana. The Controlled Substances Act, however, prohibits the use of marijuana without regard to whether it is used for medicinal purposes. As the Supreme Court has recognized, by classifying marijuana as a Schedule I drug, Congress has expressed its judgment that marijuana has no recognized medical use. *See Raich*, 545 U.S. at 14, 125 S.Ct. 2195. Congress did not intend to enact a limited prohibition on the use of ***178** marijuana—*i.e.*, to prohibit the use of marijuana unless states chose to authorize its use for medical purposes. *Cf. Barnett Bank*, 517 U.S. at 31–35, 116 S.Ct. 1103 (reaching a similar conclusion regarding the scope of the national bank act). Rather, Congress imposed a blanket federal prohibition on the use of marijuana without regard to state permission to use marijuana for medical purposes. *Oakland Cannabis Buyers' Cooperative*, 532 U.S. at 494 & n. 7, 121 S.Ct. 1711.

Affirmatively authorizing a use that federal law prohibits stands as an obstacle to the implementation and execution of the full purposes and objectives of the Controlled Substances Act. *Michigan Canners*, 467 U.S. at 478, 104 S.Ct. 2518. To be sure, state law does not prevent the federal government from enforcing its marijuana laws against medical marijuana users in Oregon if the federal government chooses to do so. But the state law at issue in *Michigan Canners* did not prevent the federal government from seeking injunctive and other relief to enforce the federal prohibition in that case. Rather, state law stood as an obstacle to the enforcement of federal law in *Michigan Canners* because state law affirmatively authorized the very conduct that federal law prohibited, as it does in this case.

To the extent that ORS 475.306(1) affirmatively authorizes the use of medical marijuana, federal law preempts that subsection, leaving it "without effect." *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992) ("[S]ince our decision in *McCulloch v. Maryland*, 4 Wheat. 316, 427 [4 L.Ed. 579] (1819), it has been settled that state law that conflicts with federal law is 'without effect.' "). Because ORS 475.306(1) was not enforceable when employer discharged employee, no enforceable state law either authorized employee's use of marijuana or excluded its use from the "illegal use of drugs," as that phrase is defined in ORS 659A.122(2) and used in ORS 659A.124. It follows that BOLI could not rely on the exclusion in ORS 659A.122(2) for "uses authorized * * * under other provisions of state * * * law" to conclude that medical marijuana use was not an illegal use of drugs within the meaning of ORS 659A.124.

***179** The commissioner reached a different conclusion regarding preemption, as would the dissenting opinion. We address the commissioner's reasoning before turning to the dissent. The commissioner, for his part, adopted the reasoning from an informal Attorney General opinion, dated June 17, 2005, ****530** which concluded that the Controlled Substances Act does not invalidate the Oregon Medical Marijuana Act. Letter of Advice dated June 17, 2005, to Susan M. Allan, Public Health Direction, Department of Human Services. In reaching that conclusion, the Attorney General focused on those parts of the Oregon Medical Marijuana Act that either exempt medical marijuana users from state criminal liability or provide an affirmative defense to criminal charges. *Id.* at 2.[17] In concluding that those exemptions from state criminal liability were valid, the Attorney General relied on a line of federal cases holding that "Congress cannot compel the States to enact or enforce a federal regulatory program." *See Printz v. United States*, 521 U.S. 898, 935, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997) (so stating); *New York v. United States*, 505 U.S. 144, 162, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992) (stating that "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress's instructions"). The Attorney General concluded that Oregon was free, as a matter of state law, to exempt medical marijuana use from criminal liability because Congress lacks the authority to require Oregon to prohibit that use.

17 The Attorney General's opinion stated that the Oregon Medical Marijuana Act "protects users who comply with its requirements from state criminal prosecution for production, possession, or delivery of a controlled substance." Letter Opinion at 2. In support of that statement, the opinion cited *former* ORS 475.306(2) (2003), which provided an affirmative defense for persons who possessed excess amounts of marijuana if possession of that amount of marijuana were medically necessary. *See* Or. Laws 2005, ch. 822, § 2 (repealing that provision). The opinion also cited ORS 475.319 and ORS 475.309(9), which provides an affirmative defense to criminal liability for persons who have

applied for but not yet received a registry identification card.

The Attorney General's opinion has no bearing on the issue presented in this case for two reasons. First, as noted, one subsection of the Oregon Medical Marijuana Act affirmatively authorizes the use of medical marijuana. ***180** ORS 475.306(1). Other provisions exempt its use from state criminal liability. *See, e.g.,* ORS 475.309(1); ORS 475.319. In this case, only the validity of the authorization matters. ORS 659A.122(2) excludes medical marijuana use from the definition of "illegal use of drugs" for the purposes of the state employment discrimination laws if state law authorizes that use. The Attorney General's opinion, however, addresses only the validity of the exemptions; it does not address the validity of the authorization found in ORS 475.306(1). It thus does not address the issue that is central to the resolution of this case.

Second, and more importantly, the validity of the exemptions and the validity of the authorization turn on different constitutional principles. The Attorney General reasoned that the exemptions from criminal liability are valid because "Congress cannot compel the States to enact or enforce a federal regulatory program"—a restriction that derives from Congress's limited authority under the federal constitution. *See Printz,* 521 U.S. at 935, 117 S.Ct. 2365 (stating limited authority); *New York,* 505 U.S. at 161–66, 112 S.Ct. 2408 (describing the sources of that limitation). Under the Attorney General's reasoning and the United States Supreme Court decisions on which his opinion relies, Congress lacks authority to require states to criminalize conduct that the states choose to leave unregulated, no matter how explicitly Congress directs the states to do so.

By contrast, there is no dispute that Congress has the authority under the Supremacy Clause to preempt state laws that affirmatively authorize the use of medical marijuana. Whether Congress has exercised that authority turns on congressional intent: that is, did Congress intend to preempt the state law? *See Cipollone,* 505 U.S. at 516, 112 S.Ct. 2608 (describing preemption doctrine). More specifically, the constitutional question in this case is whether, under the doctrine of implied preemption, a state law authorizing the use of medical marijuana "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *See Hines,* 312 U.S. at 67, 61 S.Ct. 399 (stating that test). Nothing in the Attorney General's opinion addresses that question, and the commissioner erred in finding an answer in the Attorney ***181** General's opinion ****531** to a question that the Attorney General never addressed.

The dissent addresses the issue that the Attorney General's opinion did not and would hold for alternative reasons that ORS 475.306(1) does not stand as an obstacle to the full accomplishment of Congress's purposes in enacting the Controlled Substances Act. The dissent reasons that, because ORS 475.306(1) does not "giv[e] permission to violate the Controlled Substances Act or affec [t] its enforcement, [that subsection] does not pose an obstacle to the federal act necessitating a finding of implied preemption." 348 Or. at 197, 230 P.3d at 539 (Walters, J., dissenting).[18] In the dissent's view, the fact that a state law affirmatively authorizes conduct that federal law explicitly forbids is not sufficient to find that the state law poses an obstacle to the full accomplishment of the purposes of the federal law and is thus preempted. The dissent also advances what appears to be an alternative basis for its position. It reasons that the Oregon Medical Marijuana Act, as a whole, exempts medical marijuana use from state criminal liability and that ORS 475.306(1) is merely one part of that larger exemption. It appears to draw two different legal conclusions from that alternative proposition. It suggests that, to the extent ORS 475.306(1) merely exempts medical marijuana use from criminal liability, then Congress lacks power to require states to criminalize that conduct under the line of cases that the Attorney General cited. Alternatively, it suggests that, because authorization is merely the other side of the coin from exemption, authorizing medical marijuana use poses no more of an obstacle to the accomplishment of the purposes of the Controlled Substances Act than exempting that use from state criminal liability and thus that use is not preempted. We begin with the test that the dissent would employ in obstacle preemption cases.

[18] The dissent phrases the test it would apply in various ways throughout its opinion. For instance, it begins its opinion by stating that the Oregon Medical Marijuana Act neither "permits [n]or requires the violation of the Controlled Substances Act." 348 Or. at 190, 230 P.3d at 536 (Walters, J., dissenting). Because the Oregon Medical Marijuana Act permits (and indeed authorizes) conduct that violates the Controlled Substances Act, we understand the dissent to use the word "permits" to mean expressly purports to "giv[e] permission," as it later rephrases its test. We also note that, if the Oregon Medical Marijuana Act "required" a violation of federal law, then the physical impossibility prong of implied preemption would apply.

***182** As noted, the dissent would hold that a state law stands as an obstacle to the execution and accomplishment of the full purposes of a federal law (and

is thus preempted) if the state law purports to override federal law either by giving permission to violate the federal law or by preventing the federal government from enforcing its laws. We do not disagree that such a law would be an obstacle. But it does not follow that anything less is not an obstacle. Specifically, we disagree with the dissent's view that a state law that specifically authorizes conduct that a federal law expressly forbids does not pose an obstacle to the full accomplishment of the purposes of the federal law and is not preempted.

If Congress chose to prohibit anyone under the age of 21 from driving, states could not authorize anyone over the age of 16 to drive and give them a license to do so. The state law would stand as an obstacle to the accomplishment of the full purposes and objectives of Congress (keeping everyone under the age of 21 off the road) and would be preempted. Or, to use a different example, if federal law prohibited all sale and possession of alcohol, a state law licensing the sale of alcohol and authorizing its use would stand as an obstacle to the full accomplishment of Congress's purposes. ORS 475.306(1) is no different. To the extent that ORS 475.306(1) authorizes persons holding medical marijuana licenses to engage in conduct that the Controlled Substances Act explicitly prohibits, it poses the same obstacle to the full accomplishment of Congress's purposes (preventing all use of marijuana, including medical uses).

The dissent, however, reasons that one state case and four federal cases support its view of obstacle preemption. It reads *State v. Rodriguez*, 317 Or. 27, 854 P.2d 399 (1993), as providing direct support for its view. *See* 348 Or. at 197–98, 230 P.3d at 539–40 (Walters, J., dissenting). In *Rodriguez*, federal ****532** Immigration and Naturalization Service (INS) agents obtained evidence pursuant to a federal administrative warrant that was valid under federal law but not under the Oregon Constitution, and the question was whether suppressing evidence obtained pursuant to that warrant in a ***183** state criminal proceeding was an obstacle to the accomplishment of the full purposes and objectives of the federal immigration laws. This court held that it was not. Suppressing evidence in the state criminal proceeding was completely unrelated to the INS's ability to carry out its separate mission of enforcing the federal immigration laws in a federal administrative proceeding. This court did not hold in *Rodriguez*, as the dissent appears to conclude, that state law will be an obstacle to the full accomplishment of the purposes of the federal law only if state law interferes with the federal government's ability to enforce its laws.

The dissent also relies on four United States Supreme Court cases "for the proposition that states may impose standards of conduct different from those imposed by federal law without creating an obstacle to the federal law." 348 Or. at 199, 230 P.3d at 541 (Walters, J., dissenting). It follows, the dissent reasons, that the mere fact that state law authorizes conduct that federal law forbids does not mean that state law is an obstacle to the accomplishment of the purposes of the federal law. The four cases on which the dissent relies stand for a narrower proposition than the dissent draws from them. In interpreting the applicable federal statute in each of those cases, the Court concluded that Congress intended to leave states free to impose complementary or supplemental regulations on a person's conduct. None of those cases holds that states can authorize their citizens to engage in conduct that Congress explicitly has forbidden, as ORS 475.306(1) does.

In *Wyeth*, one of the cases on which the dissent relies, the defendant argued that permitting state tort remedies based on a drug manufacturer's failure to warn would "interfere with 'Congress's purpose to entrust an expert agency to make drug labeling decisions that strike a balance between competing objectives.' " 129 S.Ct. at 1199 (quoting the defendant's argument). After considering the history of the federal statute, the Court concluded that "Congress did not intend FDA oversight to be the exclusive means of ensuring drug safety and effectiveness." *Id.* at 1200. The Court concluded instead that Congress intended to allow complementary state tort remedies. *Id.* Given that interpretation of the federal law, the Court determined that the state tort remedy ***184** was consistent with, and not an obstacle to, Congress's purpose in requiring warnings in the first place. Put differently, the state law was not an obstacle to Congress's purpose because Congress intended to permit states to continue enforcing complementary tort remedies.

The Court's opinion in *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963), on which the dissent also relies, is to the same effect. In that case, the Court determined that a federal marketing order setting minimum standards for picking, processing, and transporting avocados did not reflect a congressional intent to prevent states from enacting laws governing "the distribution and retail sale of those commodities." 373 U.S. at 145, 83 S.Ct. 1210. As the Court explained, "[c]ongressional regulation at one end of the stream of commerce does not, *ipso facto*, oust all state regulation at the other end." *Id.* The Court accordingly concluded that there was "no irreconcilable conflict with the federal regulation [that] require[d] a conclusion that [the state law] was displaced." *Id.* at 146, 83 S.Ct. 1210.[19] The Court's reasoning implies that, when, as in this case, there is an irreconcilable conflict between

****533** state and federal law, that conflict "requires a conclusion that [the state law] [i]s displaced." *See id.*

[19] The dissenting opinion quotes the dissent in *Florida Lime & Avocado* for the proposition that the conflict between state and federal law in that case was unmistakable. *See* 348 Or. at 200–02, 230 P.3d at 541–42 (Walters, J., dissenting) (quoting *Florida Lime & Avocado*, 373 U.S. at 173, 83 S.Ct. 1210 (White, J., dissenting)). The majority, however, disagreed on that point, 373 U.S. at 145–46, 83 S.Ct. 1210, and its conclusion that federal law left room for complementary state law was pivotal to its conclusion that the federal marketing order did not preempt California law.

In both *Florida Lime & Avocado* and *Wyeth* and the other two cases the dissent cites, the Court interpreted the applicable federal statute to permit complementary or supplementary state law.[20] None of those cases considered state ***185** laws that authorized conduct that the federal law specifically prohibited, as is present in this case, and none of those cases stands for the proposition that such a law would not be an obstacle to the accomplishment of the full purposes of Congress. Rather, the Court's opinion in *Florida Lime & Avocado* points in precisely the opposite direction; it teaches that when, as in this case, the state and federal laws are in "irreconcilable conflict," federal law will displace state law. *See* 373 U.S. at 146, 83 S.Ct. 1210.

[20] The other two United States Supreme Court cases on which the dissent relies are to the same effect. Neither case involved a federal statute that, as the Court interpreted it, prohibited what the state law authorized. *See California v. ARC America Corp.*, 490 U.S. 93, 103, 109 S.Ct. 1661, 104 L.Ed.2d 86 (1989) (explaining that nothing in an earlier decision that only direct purchasers may bring an action under section 4 of the Clayton Act "suggests that it would be contrary to congressional purposes for States to allow indirect purchasers to recover under their own antitrust laws"); *Silkwood v. Kerr–McGee Corp.*, 464 U.S. 238, 256, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984) (holding that, even though Congress "was well aware of the NRC's exclusive authority to regulate safety matters," Congress also had "assumed that state law remedies, in whatever form they might take, were available to those injured in nuclear incidents").

As noted, the dissent also advances what appears to be an alternative ground for its position. The dissent reasons that ORS 475.306(1) does not affirmatively authorize the use of medical marijuana; it views that subsection instead as part of a larger exemption of medical marijuana use from state criminal laws. The dissent's reasoning is difficult to square with the text of ORS 475.306(1). That subsection provides that a person holding a registry identification card "may engage" in the limited use of medical marijuana. Those are words of authorization, not exemption. Beyond that, if ORS 475.306(1) were merely part of a larger exemption, then no provision of state law would authorize the use of medical marijuana. If that were true, medical marijuana use would not come within one of the exclusions from the "illegal use of drugs," as that phrase is defined in ORS 659A.122, and the protections of ORS 659A.112 would not apply to employee. *See* ORS 659A.124 (so providing).[21]

[21] There is a suggestion in the dissent that ORS 475.306(1) is integral to the goal of exempting medical marijuana use from state criminal liability and cannot be severed from the remainder of the Oregon Medical Marijuana Act. That act, however, contains an express severability clause, and it is not apparent why the provisions exempting medical marijuana use from state criminal liability cannot "be given full effect without [the authorization to use medical marijuana found in ORS 475.306(1)]." *See* Or. Laws 1999, ch. 4, § 18 (providing the terms for severing any part of the act held invalid).

[10] Another thread runs through the dissent. It reasons that, as a practical matter, authorizing medical marijuana use is no different from exempting that use from criminal liability. It concludes that, if exempting medical marijuana use from criminal liability is not an obstacle to the accomplishment of the purposes of the Controlled Substances Act and is ***186** thus not preempted, then neither is a state law authorizing medical marijuana use. The difficulty with the dissent's reasoning is its premise. It presumes that a law exempting medical marijuana use from liability is valid because it is not preempted. As the Attorney General's opinion explained, however, Congress lacks the authority to compel a state to criminalize conduct, no matter how explicitly it directs a state to do so. When, however, a state affirmatively authorizes conduct, Congress has the authority to preempt that law and did so here. The dissent's reasoning fails to distinguish those two analytically separate constitutional principles.

In sum, whatever the wisdom of Congress's policy choice to categorize marijuana as a Schedule I drug, the Supremacy Clause requires that we respect that choice when, as in this case, state law stands as an obstacle to the accomplishment of the full purposes of the federal law. Doing so means that ****534** ORS 475.306(1) is not

enforceable. Without an enforceable state law authorizing employee's use of medical marijuana, that basis for excluding medical marijuana use from the phrase "illegal use of drugs" in ORS 659A.122(2) is not available.

[11] As noted, a second possible exclusion from the definition of "illegal use of drugs" exists, which we also address. The definition of "illegal use of drugs" also excludes from that phrase "the use of a drug taken under supervision of a licensed health care professional."[22] ORS 659A.122(2). On that issue, as noted above, employee's physician signed a statement that employee had been diagnosed with a debilitating condition, that marijuana may mitigate the symptoms or effects of that condition, but that the physician's statement was not a prescription to use marijuana. That statement was sufficient under the Oregon Medical Marijuana Act to permit ***187** employee to obtain a registry identification card, which then permitted him to use marijuana to treat his condition. Employee's physician recommended that employee use marijuana five to seven times daily by inhalation. However, without a prescription, employee's physician had no ability to control either the amount of marijuana that employee used or the frequency with which he used it, if employee chose to disregard his physician's recommendation.

22 The commissioner did not consider whether this exclusion applied, in part because the Court of Appeals had stated in *Washburn* that the use of marijuana for medical purposes was "not unlawful," which the parties and the commissioner concluded was sufficient to answer employer's reliance on ORS 659A.124. Although we could remand this case to the commissioner to permit him to address whether this exclusion applies, its application in this case turns solely on an issue of statutory interpretation, an issue on which we owe the commissioner no deference. In these circumstances, we see no need to remand and unnecessarily prolong the resolution of this case.

The question thus posed is whether employee used marijuana "under supervision of a licensed health care professional." The answer to that question turns initially on what a person must show to come within that exclusion. As explained below, we conclude that two criteria must be met to come within the exclusion. As an initial matter, the phrase "taken under supervision" of a licensed health care professional implies that the health care professional is monitoring or overseeing the patient's use of what would otherwise be an illegal drug. *See Webster's Third New Int'l Dictionary* 2296 (unabridged ed. 2002) (defining supervise as "coordinate, direct, and inspect continuously and at first hand the accomplishment of" a task); *cf. Moore*, 423 U.S. at 143, 96 S.Ct. 335 (holding that a physician who prescribed methadone, a Schedule II controlled substance, without regulating his patients' dosage and with no precautions against his patients' misuse of methadone violated section 841 of the Controlled Substances Act).

Beyond supervision, when a health care professional administers a controlled substance, the exclusion requires that the Controlled Substances Act authorize him or her to do so. That follows from the text and context of the definition of illegal use of drugs set out in ORS 659A.122(2). After providing that the illegal use of drugs does not include "the use of a drug taken under supervision of a licensed health care professional," the legislature added "or other uses authorized under the Controlled Substances Act." The phrase "or other uses authorized by the Controlled Substances Act" is telling. The words "other uses" imply that the preceding use (the use of drugs taken under supervision of a licensed health care professional) also refers to a use authorized by the Controlled Substances Act. *See Webster's* at 1598 (defining "other" as "being the one (as of two or more) left").

***188** Not only does the text of ORS 659A.122(2) imply that the use of controlled substances taken under supervision of a licensed health care professional refers to uses that the Controlled Substances Act authorizes, but the context leads to the same conclusion. *See Stevens v. Czerniak*, 336 Or. 392, 401, 84 P.3d 140 (2004) (explaining that context includes " 'the preexisting common law and the statutory framework within which the law was enacted' ") (quoting *Denton and Denton*, 326 Or. 236, 241, 951 P.2d 693 (1998)). As noted, the Controlled Substances Act both authorizes physicians and other health care professionals to administer ****535** controlled substances for medical and research purposes and defines the scope of their authority to do so. *See Moore*, 423 U.S. at 138–40, 96 S.Ct. 335 (so holding). We infer that, in excluding "the use of a drug taken under supervision of licensed health care professionals" from the phrase "illegal use of drugs," the legislature intended to refer to those medical and research uses that, under the Controlled Substances Act, physicians and other health care professionals lawfully can put controlled substances.

Another contextual clue points in the same direction. The exclusion in ORS 659A.122(2) for the use of a drug taken under supervision of a licensed health care professional is virtually identical to an exclusion in the definition of illegal use of drugs found in the ADA. *See* 42 U.S.C. § 12111(6)(A) (excluding "the use of a drug taken under supervision by a licensed health care professional, or

other uses authorized by the Controlled Substances Act"). The federal exclusion contemplates medical and research uses that the Controlled Substances Act authorizes, and there is no reason to think that, in adopting the same exclusion, the Oregon legislature had any different intent in mind. *Cf. Stevens*, 336 Or. at 402–03, 84 P.3d 140 (looking to the federal counterpart to ORCP 36 to determine Oregon legislature's intent). Given the text and context of ORS 659A.122(2), we conclude that, when a health care professional administers a controlled substance, the exclusion for the "use of a drug taken under supervision of a licensed health care professional" refers to those medical and research uses that the Controlled Substances Act authorizes.

***189** In sum, two criteria are necessary to come within the exclusion for the use of a controlled substance taken under supervision of a licensed health care professional: (1) the Controlled Substances Act must authorize a licensed health care professional to prescribe or administer the controlled substance and (2) the health care professional must monitor or supervise the patient's use of the controlled substance. In this case, we need not decide whether the evidence was sufficient to prove the second criterion—*i.e.*, whether employee's physician monitored or oversaw employee's use of marijuana. Even if it were, the Controlled Substances Act did not authorize employee's physician to administer (or authorize employee to use) marijuana for medical purposes. As noted, under the Controlled Substances Act, physicians may not prescribe Schedule I controlled substances for medical purposes. At most, a physician may administer those substances only as part of a Food and Drug Administration preapproved research project.[23] Because there is no claim in this case that employee and his physician were participating in such a project, employee's use of marijuana was not taken under supervision of a licensed health care professional, as that phrase is used in ORS 659A.122(2).

[23] *Gonzales v. Oregon*, 546 U.S. 243, 126 S.Ct. 904, 163 L.Ed.2d 748 (2006), addressed a different issue from the one presented here. The Controlled Substances Act provides that Schedule II controlled substances have accepted medical uses, and the issue in *Gonzales* was whether the Attorney General had exceeded his statutory authority in defining which uses of Schedule II controlled substances were legitimate medical uses. In this case, by contrast, the Controlled Substances Act provides that Schedule I controlled substances, such as marijuana, have no accepted medical use. That congressional policy choice both addresses and conclusively resolves the issue that the Attorney General lacked statutory authority to address in *Gonzales.*

Because employee did not take marijuana under supervision of a licensed health care professional and because the authorization to use marijuana found in ORS 475.306(1) is unenforceable, it follows that employee was currently engaged in the illegal use of drugs and, as the commissioner found, employer discharged employee for that reason. Under the terms of ORS 659A.124, "the protections of ORS 659A.112 do not apply" to employee. The commissioner's final order on reconsideration rests, however, on the premise ***190** that the protections of ORS 659A.112—specifically, the requirement for employer to engage in a "meaningful interactive process" as an aspect of reasonable accommodation—do apply to employee. Under ORS 659A.124, that premise is mistaken, and the commissioner's revised order on reconsideration cannot stand. Both the commissioner's order and the Court of Appeals decision affirming ****536** that order on procedural grounds must be reversed.

Given the number of the issues discussed in this opinion, we summarize the grounds for our decision briefly. First, employer preserved its challenge that, as a result of the Controlled Substances Act, the use of medical marijuana is an illegal use of drugs within the meaning of ORS 659A.124. Second, two potentially applicable exclusions from the phrase "illegal use of drugs"—the use of drugs authorized by state law and the use of drugs taken under the supervision of a licensed health care professional—do not apply here. Third, regarding the first potentially applicable exclusion, to the extent that ORS 475.306(1) authorizes the use of medical marijuana, the Controlled Substances Act preempts that subsection. We note that our holding in this regard is limited to ORS 475.306(1); we do not hold that the Controlled Substances Act preempts provisions of the Oregon Medical Marijuana Act that exempt the possession, manufacture, or distribution of medical marijuana from state criminal liability. Fourth, because employee was currently engaged in the illegal use of drugs and employer discharged him for that reason, the protections of ORS 659A.112, including the obligation to engage in a meaningful interactive discussion, do not apply. ORS 659A.124. It follows that BOLI erred in ruling that employer violated ORS 659A.112.

The decision of the Court of Appeals and the revised order on reconsideration of the Commissioner of the Bureau of Labor and Industries are reversed.

WALTERS, J., dissented and filed an opinion, in which DURHAM, J., joined.

WALTERS, J., dissenting.

Neither the Oregon Medical Marijuana Act nor any provision thereof permits or requires the violation of the Controlled Substances Act or affects or precludes its enforcement. Therefore, neither the Oregon act nor any provision thereof stands as an obstacle to the federal act. Because the ***191** majority wrongly holds otherwise, and because, in doing so, it wrongly limits this state's power to make its own laws, I respectfully dissent.

The United States Constitution establishes a system of dual sovereignty in which state and federal governments exercise concurrent authority over the people. *Printz v. United States*, 521 U.S. 898, 920, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997). Each government is supreme within its own sphere. *Id.* at 920–21, 117 S.Ct. 2365. In enacting the federal Controlled Substances Act, which prohibits all use of marijuana, Congress acted pursuant to its authority under the Commerce Clause. *Gonzales v. Raich*, 545 U.S. 1, 5, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005). In enacting the Oregon Medical Marijuana Act, which permits the circumscribed use of medical marijuana, Oregon acted pursuant to its historic power to define state criminal law and to protect the health, safety, and welfare of its citizens. *Whalen v. Roe*, 429 U.S. 589, 603, 603 n. 30, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977); *Robinson v. California*, 370 U.S. 660, 664, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962).

In enacting the Controlled Substances Act, Congress did not have the power to require Oregon to adopt, as state criminal law, the policy choices represented in that federal act. Congress does not have the power to commandeer a state's legislative processes by compelling it to enact or enforce federal laws. *New York v. United States*, 505 U.S. 144, 149, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992). "[E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts." *Id.* at 166, 112 S.Ct. 2408.

Because it had authority to enact the Controlled Substances Act, Congress did, however, have the power to expressly preempt state laws that conflict with the Controlled Substances Act. A cornerstone of the Supreme Court's Supremacy Clause analysis is that "[i]n all pre-emption cases, and particularly in those in which Congress has legislated in a field which the States have traditionally occupied," the Court "start[s] with the assumption that the historic police powers of the States were not to be superseded ***192** by the Federal Act unless that was the clear and ****537** manifest purpose of Congress." *Wyeth v. Levine*, —— U.S. ——, ——, 129 S.Ct. 1187, 1194–95, 173 L.Ed.2d 51 (2009) (internal ellipsis and quotation marks omitted). The Court relies on that presumption out of "respect for the States as independent sovereigns in our federal system." *Id.* at 1195 n. 3 (internal quotation marks omitted).

As the majority recognizes, the Controlled Substances Act does not include an express preemption provision. 348 Or. at 173–75, 230 P.3d at 526–27. It contains, instead, "a saving clause" intended to "preserve state law." *See Wyeth*, 129 S.Ct. at 1196 (so construing nearly identical provision in Federal Food, Drug, and Cosmetic Act). Thus, the majority should begin its analysis "with the assumption that the historic police powers [exercised by the State of Oregon] were not to be superseded by the Federal Act * * *." *Id.* at 1194–95.

The majority does not do so. It instead implies, from the federal policy choice that the Controlled Substances Act represents, a Congressional intent to preempt provisions of Oregon law that makes a different policy choice. 348 Or. at 184, 230 P.3d at 532–33. To understand the majority's error in applying the "obstacle" prong of the United States Supreme Court's implied preemption analysis, it is important to understand the purposes and effects of the federal and state laws that are at issue in this case.

Congress enacted the federal Controlled Substances Act, as the majority explains, to "conquer drug abuse" and "control" traffic in controlled substances. 348 Or. at 172–73, 230 P.3d at 526. In listing marijuana as a Schedule I drug, Congress decided that marijuana has no recognized medical use. Therefore, "Congress imposed a blanket federal prohibition" on the use of marijuana. 348 Or. at 178, 230 P.3d at 529. As noted, Congress did not expressly indicate, however, that states could not enact their own criminal drug laws or make different decisions about the appropriate use of marijuana.

Oregon did in fact enact its own criminal drug laws, including the state Uniform Controlled Substances Act (***193** ORS 475.005 to 475.285 and ORS 475.840 to 475.980). That act controls and punishes, as state criminal law, the use of all substances that the federal government classifies as Schedule I drugs, including marijuana. ORS 475.840; ORS 475.856–475.864. Oregon also enacted the Oregon Medical Marijuana Act. That act exempts certain medical marijuana users from the *state* criminal drug laws, including from the *state* Uniform Controlled Substances Act. The Oregon Medical Marijuana Act does

not permit Oregonians to violate the federal Controlled Substances Act or bar the federal government from continuing to enforce the federal Controlled Substances Act against Oregonians. The Oregon Attorney General described the purpose and reach of the Oregon Medical Marijuana Act in a letter ruling:

> "The Act protects medical marijuana users who comply with its requirements from *state* criminal prosecution for production, possession, or delivery of a controlled substance. *See, e.g.,* ORS 475.306(2), 475.309(9) and 475.319. However, *the Act neither protects marijuana plants from seizure nor individuals from prosecution if the federal government chooses to take action* against patients or caregivers under the federal [Controlled Substances Act]. The Act is explicit in its scope: 'Except as provided in ORS 475.316 and 475.342, a person engaged in or assisting in the medical use of marijuana [in compliance with the terms of the Act] is excepted from the criminal laws *of the state* for possession, delivery or production of marijuana, aiding and abetting another in the possession, delivery or production of marijuana or any other criminal offense in which possession, delivery or production of marijuana is an element * * *.' ORS 475.309(1)."

Letter of Advice dated June 17, 2005, to Susan M. Allen, Public Health Director, Department of Human Services, 2 (first emphasis in original; later emphases added).[1] The ****538** Oregon Attorney General also concluded in that letter ruling ***194** that the decision of the Supreme Court in *Raich*—that Congress had authority to enact the blanket prohibitions in the Controlled Substances Act—had no effect on the validity of Oregon's statute:

> "*Raich* does *not* hold that state laws regulating medical marijuana are invalid nor does it require states to repeal existing medical marijuana laws. Additionally, the case does not oblige states to enforce federal laws. * * * The practical effect of *Raich* in Oregon is to affirm what we have understood to be the law since the adoption of the Act."[2]

[1] Consistent with the Attorney General's letter opinion, ORS 475.300(4) provides that ORS 475.300 to 475.346—the entirety of the Oregon Medical Marijuana Act—is "intended to make only those changes to existing *Oregon laws* that are necessary to protect patients and their doctors from criminal and civil penalties[.]" (Emphasis added.)

[2] The question that the Oregon Attorney General answered in the letter opinion was "Does *Gonzales v. Raich,* 545 U.S. [1, 125 S.Ct. 2195, 162 L.Ed.2d 1] (2005), * * * invalidate the Oregon statutes authorizing the operation of the Oregon Medical Marijuana Program?" The Attorney General said, "No." The Attorney General explained that "[t]he Act protects medical marijuana users who comply with its requirements from state criminal prosecution for production, possession, or delivery of a controlled substance," and cited ORS 475.309, ORS 475.319, and ORS 475.306(2). At the time of the Attorney General opinion, ORS 475.306(2) (2003) provided:

> "If the individuals described in subsection (1) of this section possess, deliver or produce marijuana in excess of the amounts *allowed* in subsection (1) of this section, such individuals are not excepted from the criminal laws of the state but may establish an affirmative defense to such charges, by a preponderance of the evidence that the greater amount is medically necessary to mitigate the symptoms or effects of the person's debilitating medical condition."

ORS 475.306(2) (2003), *amended by* Or. Laws 2005, ch. 822, § 2 (emphasis added). Thus, one of the subsections of the Oregon Medical Marijuana Act that the Attorney General cited used words of authorization very similar to those used in ORS 475.306(1).

Throughout the opinion, the Attorney General discussed the continued validity of the Oregon Medical Marijuana Act as a whole and did not in any way differentiate between provisions of the act that authorize medical marijuana use and those that create an exemption from state prosecution. In fact, the Attorney General specifically opined that the state is entitled to continue to issue registry identification cards—cards that, by definition, are documents that identify persons "*authorized* to engage in the medical use of marijuana." ORS 475.302(10) (emphasis added).

Id. (emphasis in original).

The majority seems to accept that the Oregon Medical Marijuana Act does not bar the federal government from enforcing the Controlled Substances Act. The majority acknowledges that "state law does not prevent the federal government from enforcing its marijuana laws against medical marijuana users in Oregon if the federal government chooses to do so." 348 Or. at 178, 230 P.3d at 529. The majority also seems to accept, as a result, that

provisions of the Oregon Medical Marijuana Act that exempt persons from state criminal liability do not pose an obstacle to the Controlled Substances Act.[3] However, in the majority's view, one subsection of the Oregon Medical ***195** Marijuana Act, ORS 475.306(1), presents an obstacle to the Controlled Substances Act and does so solely because it includes words of authorization. *Id.* at 178–79, 230 P.3d at 529–30.

[3] The majority expressly leaves that question open, however. 348 Or. at 172 n. 12, 230 P.3d at 526 n. 12.

As I will explain in more detail, I believe that the majority is incorrect in reaching that conclusion. First, the words of authorization used in ORS 475.306(1) and other subsections of the Oregon Medical Marijuana Act serve only to make operable the exceptions to and exemptions from state prosecution provided in the remainder of the act. The words of authorization used in those subsections do not grant authorization to act that is not already inherent in the exceptions or exemptions, nor do they permit the violation of federal law. Second, in instances in which state law imposes standards of conduct that are different than the standards of conduct imposed by federal law, but both laws can be enforced, the Supreme Court has not held the state laws to be obstacles to the federal laws, nor discerned an implied Congressional intent to preempt the state laws from the different policy choices made by the federal government. Thus, the majority is incorrect in finding that the standard of conduct and policy choice represented by the Controlled Substances Act prohibits a different state standard of conduct and policy choice. Both the Oregon Medical Marijuana Act and the ****539** Controlled Substances Act can be enforced, and this state court should not interpret the federal act to impliedly preempt the state act.

The Oregon Medical Marijuana Act contains a number of subsections that use words of authorization. Those subsections are interwoven with the subsections of the act that except and exempt medical marijuana users from criminal liability. For instance, ORS 475.309, which the majority cites as a provision that excepts persons who use medical marijuana from state criminal liability, 348 Or. at 179–80, 230 P.3d at 530, provides that a person engaged in or assisting in the medical use of marijuana "is *excepted* from the criminal laws of the state" *if* ***196** certain conditions, including holding a "*registry identification card*," are satisfied. (Emphases added.) ORS 475.302(10) defines "registry identification card" as follows:

> "a document issued by the department that identifies a person *authorized* to engage in the medical use of marijuana and the person's designated primary caregiver, if any."

(Emphasis added.)

Consider also ORS 475.306(1), the section of the act that the majority finds offending. That subsection references both ORS 475.309, the exception section, and the registry identification card necessary to that exception. ORS 475.306(1) provides:

> "A person who possesses a *registry identification card* issued *pursuant to ORS 475.309* may engage in, and a designated primary caregiver of such person may assist in, the medical use of marijuana only as justified to mitigate the symptoms or effects of the person's debilitating medical condition."[4]

[4] The majority recognizes that it is essential to read ORS 475.306(1) and ORS 475.302(10) together to find an affirmative authorization to use marijuana for medicinal purposes. 348 Or. at 170–71, 230 P.3d at 525. However, the majority does not explain why it finds ORS 475.306(1) and not ORS 475.302(10) preempted.

(Emphasis added.) Reading those three provisions together, it is clear that ORS 475.306(1) serves as a *limitation* on the use of medical marijuana that the registry identification card and ORS 475.309 together permit. Under ORS 475.306(1), a person who possesses a registry identification card issued pursuant to ORS 475.309 may engage in the use the card permits "*only* as justified to mitigate the symptoms or effects of the person's debilitating medical condition." (Emphasis added.)

ORS 475.319, another section of the act that the majority cites as creating an exemption from criminal liability, also depends on words of permission for its operation. 348 Or. at 179–80, 230 P.3d at 530. ORS 475.319 creates an affirmative defense to a criminal charge of possession of marijuana, but only for persons who possess marijuana "in amounts *permitted* under ORS 475.320." (Emphasis added.) ORS 475.320(1)(a) provides: "A *registry identification cardholder* * * * *may possess* ***197** up to six mature marijuana plants and 24 ounces of usable marijuana." (Emphasis added.)

The words of authorization used in ORS 475.306(1) are no different from the words of authorization that are used in other sections of the act and that are necessary to

effectuate ORS 475.309 and ORS 475.319 and the exceptions to and exemptions from criminal liability that they create. Those words of authorization do not grant permission that would not exist if those words were eliminated or replaced with words of exception or exclusion. Even if it did not use words of permission, the Oregon Medical Marijuana Act would permit, for purposes of Oregon law, the conduct that it does not punish. Furthermore, the statutory sections that provide that citizens may, for state law purposes, engage in the conduct that the state will not punish have no effect on the Controlled Substances Act that is greater than the effect of the sections that declare that the state will not punish that conduct.

Because neither the Oregon Medical Marijuana Act nor any subsection thereof gives permission to violate the Controlled Substances Act or affects its enforcement, the Oregon act does not pose an obstacle to the federal act necessitating a finding of implied preemption. In *State v. Rodriguez*, 317 Or. 27, 854 P.2d 399 (1993), this court recognized ****540** that state and federal laws can prescribe different standards, each acting within its own authority, without affecting the other's authority, and without offending the Supremacy Clause. In that case, the defendant had been arrested by federal immigration agents on a warrant that the state conceded did not satisfy the oath or affirmation requirement of Article I, section 9, of the Oregon Constitution. The state argued, however, that, because the warrant was valid under federal law, "the Supremacy Clause render[ed] Article I, section 9, inapplicable to the arrest * * *." *Id.* at 34, 854 P.2d 399. The court rejected that argument and concluded that preemption was not at issue because the application of the state constitutional requirements for an arrest warrant did not "affect the ability of the federal government to administer or enforce its * * * laws." *Id.* at 36, 854 P.2d 399. Because the court interpreted the state constitution not to impose requirements on arrests by federal officers, the state and the federal law did not conflict:

> ***198** "Because this court's interpretation of Article I, section 9, in this context, cannot and will not interfere with the federal government in immigration matters, the Supremacy Clause has no bearing on this case and this court is not 'preempted' from applying Article I, section 9, to defendant's arrest."

Id. Similarly, the Oregon Medical Marijuana Act "cannot and will not interfere with" the federal government's enforcement of the Controlled Substances Act and does not offend the Supremacy Clause.

Instead of following *Rodriguez*, the majority relies on two United States Supreme Court cases for the proposition that state law that permits what federal law prohibits is impliedly preempted. 348 Or. at 176–77, 230 P.3d at 528–29. The majority then concludes that, "[t]o the extent that ORS 475.306(1) affirmatively authorizes the use of medical marijuana, federal law preempts that subsection, leaving it 'without effect.' " 348 Or. at 178, 230 P.3d at 529. I disagree with the majority's analysis for two reasons. First, the cases that the majority cites stand only for the proposition that when federal law bestows an unlimited power or right, state law cannot preclude the exercise of that power or right. The Controlled Substances Act does not create a right; it prohibits certain conduct. Second, other Supreme Court cases hold that when a federal law does not create powers or rights but, instead, sets standards for conduct, state law may set different standards for the same conduct without offending the Supremacy Clause, as long as both sets of laws may be enforced. By deciding not to punish the medical use of marijuana, the Oregon Medical Marijuana Act authorizes, for state law purposes, conduct that the Controlled Substances Act prohibits. The Oregon Medical Marijuana Act does not, however, offend the Supremacy Clause because it does not affect enforcement of the Controlled Substances Act.

In the first of the two cases on which the majority relies, *Barnett Bank v. Nelson,* 517 U.S. 25, 116 S.Ct. 1103, 134 L.Ed.2d 237 (1996), a federal statute explicitly granted national banks the unlimited power to sell insurance in small towns. A state statute forbade and impaired the exercise of that power, and the court held that it was preempted.

***199** *Michigan Canners & Freezers Association v. Agricultural Marketing and Bargaining Bd.,* 467 U.S. 461, 104 S.Ct. 2518, 81 L.Ed.2d 399 (1984), the second case on which the majority relies, concerned a conflict between the federal Agricultural Fair Practices Act, which protects the rights of producers of agricultural goods to remain independent and to bring their products to market on their own without being required to sell those products through an association, and a Michigan statute. *Id.* at 473, 104 S.Ct. 2518. As the court explained in *Massachusetts Medical Soc. v. Dukakis,* 815 F.2d 790, 796 (1st Cir.), *cert. den.*, 484 U.S. 896, 108 S.Ct. 229, 98 L.Ed.2d 188 (1987), the Agricultural Fair Practice Act creates a "right to refrain from joining an association of producers[.]" (Ellipses omitted.) The Michigan statute at issue prevented the exercise of the right conferred by the act by precluding an agricultural producer "from marketing his goods himself" and "impos[ed] on the producer the same incidents of association membership with which Congress was concerned * * *." ****541** *Michigan Canners,* 467 U.S. at 478, 104 S.Ct. 2518. The Court held that under those

circumstances, the state statute was preempted.

Neither *Barnett* nor *Michigan Canners* stands for the proposition that a state statute that permits conduct that the federal government punishes is preempted. In those cases, the federal statutes did not punish conduct; they created powers or rights. The Court therefore struck down state statutes that forbade, impaired or prevented exercise of those powers or rights. Because the Controlled Substances Act does not create a federal power or right and the Oregon Medical Marijuana Act does not forbid, impair, or prevent the exercise of a federal power or right, *Barnett* and *Michigan Canners* are inapposite. The more relevant Supreme Court cases are those that consider the circumstance that exists when federal and state laws impose different standards of conduct. Those cases stand for the proposition that states may impose standards of conduct different from those imposed by a federal law without creating an obstacle to the federal law.

In *California v. ARC America Corp.*, 490 U.S. 93, 109 S.Ct. 1661, 104 L.Ed.2d 86 (1989), the Court considered, under the "obstacle prong" of its "actual conflict" implied preemption analysis, the conflict between Section 4 of the federal ***200** Clayton Act, which authorizes only direct purchasers to recover monopoly overcharges, and a state statute, which expressly permits recovery by indirect purchasers. The Supreme Court held that, even if the state statute directly conflicted with the goals of the federal law, as the Ninth Circuit had held, the state statute was not preempted. The Supreme Court reasoned that states are not required to pursue federal goals when enacting their own laws:

> "It is one thing to consider the congressional policies identified in *Illinois Brick* [*v. State of Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977)] and *Hanover Shoe* [*v. United Shoe Machinery Corp.*, 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968)] in defining what sort of recovery federal antitrust law authorizes; it is something altogether different, and in our view inappropriate, to consider them as defining what federal law allows States to do under their own antitrust law."

Id. at 103, 109 S.Ct. 1661.

Other Supreme Court cases also illustrate the Court's refusal to imply preemption, under the "obstacle" prong of its implied preemption analysis, where state and federal statutes set contrary standards or pursue contrary objectives. In *Silkwood v. Kerr–McGee Corp.*, 464 U.S. 238, 246, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984), a case that the court in *ARC America* cited as authority, the jury had awarded the plaintiff a judgment of $10 million in punitive damages against the defendant, a nuclear power company. The defendant asserted that a conflict existed between the state law that permitted the judgment and a federal law regulating nuclear power plants, with which the defendant had complied. Despite an earlier ruling that the Nuclear Regulatory Commission had exclusive authority to regulate the safety of nuclear power plants,[5] and even though the Court accepted that "there is tension between the conclusion that safety regulation is the exclusive concern of the federal law and the conclusion that a State may nevertheless award damages based on its own law of liability," *id.* at 256, 104 S.Ct. 615, the Court refused to invalidate the state law.

5 *Pacific Gas & Elec. v. Energy Resources Conservation & Development Comm'n*, 461 U.S. 190, 211–13, 103 S.Ct. 1713, 75 L.Ed.2d 752 (1983).

In *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963), a federal ***201** statute authorized the marketing of Florida avocados on the basis of weight, size, and picking date; California, however, regulated the marketing of avocados sold in the state on the basis of oil content. As a result of the differing standards, about six percent of Florida avocados that were deemed mature under federal standards were rejected from California markets. The plaintiffs argued that the federal standard for regulating Florida avocados preempted California's conflicting regulation. As the dissent argued:

> ****542** "The conflict between federal and state law is unmistakable here. The Secretary asserts certain Florida avocados are mature. The state law rejects them as immature. And the conflict is over a matter of central importance to the federal scheme. The elaborate regulatory scheme of the marketing order is focused upon the problem of moving mature avocados into interstate commerce. The maturity regulations are not peripheral aspects of the federal scheme."

373 U.S. at 173, 83 S.Ct. 1210 (White, J., dissenting). The majority, however, concluded that the test of whether an actual conflict existed was not whether the laws adopted contrary standards, but whether both laws could be enforced:

> "The test of whether both federal and state regulations may operate, or the state regulation must give way, is *whether both regulations can be enforced* without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives."

Id. at 142, 83 S.Ct. 1210 (emphasis added).

The Court's most recent case on the issue, *Wyeth v. Levine*, —— U.S. ——, 129 S.Ct. 1187, 173 L.Ed.2d 51 (2009), is in accord. In that case, the court was presented with a conflict between state and federal law that the dissent characterized as follows: "The FDA told Wyeth that Phenergan's label renders its use 'safe.' But the State of Vermont, through its tort law said: 'Not so.' "[6] *Id.*, 129 S.Ct. at 1231 (Alito, J. dissenting). Nevertheless, the majority upheld the state law. Although ***202** the two laws imposed contradictory standards, the state law was not preempted.

[6] The FDA had also adopted a regulation declaring that "certain state law actions, such as those involving failure-to-warn claims, 'threaten FDA's statutorily prescribed role as the expert Federal agency responsible for evaluating and regulating drugs.' " *Id.* at 1200.

The cases that I have reviewed demonstrate that the Supreme Court requires more as a basis for implying a congressional intent to preempt a state law than a Congressional purpose that is at odds with the policy that a state selects. The Court has permitted state laws that impose standards of conduct different than those set by federal laws to stand unless the state laws preclude the enforcement of the federal laws or have some other demonstrated effect on their operation. The Court has found state laws that forbid, impair or prevent the exercise of federally granted powers or rights to be preempted.

The majority does not contend, in accordance with those cases, that ORS 475.306(1) or the Oregon Medical Marijuana Act as a whole precludes enforcement of the Controlled Substances Act or has any other demonstrated effect on its "accomplishment and execution." The only obstacles to the federal act that the majority identifies are Oregon's differing policy choice and the lack of respect that it signifies. 348 Or. at 184–85, 230 P.3d at 533.

As an example of the way it believes the Supremacy Clause to operate, the majority posits that, if Congress were to pass a law prohibiting persons under the age of 21 from driving, a state law authorizing persons over the age of 16 to drive and giving them a license to do so would be preempted.[7] 348 Or. at 180–81, 230 P.3d at 530–31. The majority would be correct *if* Congress had authority to make such a law and *if* Congress expressly preempted state laws allowing persons under the age of 21 to drive or indicated an intent to occupy the field. However, without such statement of Congressional intent, implied preemption does not necessarily follow. As a sovereign state, Oregon has authority to license its drivers and to choose its own age requirements. If Oregon set at 16 years the minimum age for its drivers then, the Oregon driver licenses it issued would give 16–year–olds only state permission to drive. ***203** The Oregon law would not be preempted, but neither would it protect 16–year–olds from federal prosecution and liability.

[7] As I read the majority opinion, a state law providing that Oregon would not punish drivers between the ages of 16 and 21, as opposed to permitting those persons to drive, *would* withstand a Supremacy Clause challenge.

As a result, an Oregon legislature considering whether to enact such a law could decide, as a practical matter, that it would ****543** not be in the interest of its citizens to grant licenses that could result in federal prosecution. Suppose, however, that Congress had passed the federal law that the majority posits, but that federal officers were not enforcing it. Or suppose further that the federal government had announced a federal policy decision not to enforce the federal law against "individuals whose actions are in clear and unambiguous compliance with existing state laws" permitting minors to drive. Could Oregon not serve as a laboratory allowing minors to drive on its roads under carefully circumscribed conditions to permit them to acquire driving skills and giving Congress important information that might assist it in determining whether its policy should be changed? Is not one of federalism's chief virtues that "a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country"? *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311, 52 S.Ct. 371, 76 L.Ed. 747 (1932) (Brandeis, J., dissenting) (so contending).

In the case of medical marijuana, the federal government in fact has announced that it will not enforce the

Controlled Substances Act against "individuals whose actions are in clear and unambiguous compliance with existing state laws permitting the medical use of marijuana."[8] Oregon is not the only state that permits the use of medical marijuana, and at least one state is considering rules to "identify requirements for the licensure of producers and cannabis production facilities." New Mexico's "Lynn and Erin Compassionate Use Act," 2007 New Mexico Laws ch. 210, § 7 (SB 523).[9]

[8] Memorandum from David W. Ogden, Deputy Attorney General for Selected United States Attorneys on Investigations and Prosecutions in States *Authorizing the Medical Use of Marijuana* (Oct. 19, 2009) (available at http://blogs.usdoj.gov/blog/archives/192) (accessed Apr. 6, 2010) (emphasis in original).

[9] New Mexico's "Lynn and Erin Compassionate Use Act," 2007 New Mexico Laws ch. 210, § 7 (SB 523), requires relevant state agencies to develop rules that "identify requirements for the licensure of producers and cannabis production facilities and set forth procedures to obtain licenses," as well as "develop a distribution system for medical cannabis" that comports with certain requirements. The New Jersey "Compassionate Use Medical Marijuana Act," S119, Approved PL 2009, c. 307, § 7, provides for the creation of "alternate treatment centers, each of which

> "shall be authorized to acquire a reasonable initial and ongoing inventory, as determined by the department, of marijuana seeds or seedlings and paraphernalia, possess, cultivate, plant, grow, harvest, process, display, manufacture, deliver, transfer, transport, distribute, supply, sell, or dispense marijuana, or related supplies to qualifying patients or their primary caregivers who are registered with the department pursuant to section 4 of * * * this act."

The Maine Medical Marijuana Act provides for the creation of "nonprofit dispensaries" which are authorized to dispense up to two and one-half ounces of marijuana to qualified patients. Me. Rev. Stat. title 22, § 2428–7. In Rhode Island, "The Edward O. Hawkins and Thomas C. Slater Medical Marijuana Act," provides for the creation of "compassion centers," which "may acquire, possess, cultivate, manufacture, deliver, transfer, transport, supply or dispense marijuana * * * to registered qualifying patients and their registered primary caregivers." R.I. Gen. Laws § 21–28.6–12.

***204** As I explained at the outset, the federal government has no power to require that the Oregon legislature pass state laws to implement or give effect to federal policy choices. One sovereign may make a policy choice to prohibit and punish conduct; the other sovereign may make a different policy choice not to do so and instead to permit, for purposes of state law only, other circumscribed conduct. Absent express preemption, a particular policy choice by the federal government does not alone establish an implied intent to preempt contrary state law. A different choice by a state is just that—different. A state's contrary choice does not indicate a lack of respect; it indicates federalism at work.

The consequence of the majority's decision that the Controlled Substance Act invalidates ORS 475.306(1) is that petitioner is disqualified from the benefits of ORS 659A.124, which imposes a requirement of reasonable accommodation. The majority states that it does not decide "whether the legislature, if it chose to do so and worded Oregon's disability law differently, could require employers to reasonably accommodate otherwise qualified ****544** disabled employees who use medical marijuana to treat their disabilities." 348 Or. at 172 n. 12, 230 P.3d at 526 n. 12. Indeed, different words could be used for that purpose. For instance, the legislature could state expressly in ORS chapter 659A that disabled persons who would be entitled to the ***205** affirmative defense set forth in ORS 475.319 (a provision the majority does not find preempted) are not disqualified from the protections of the Oregon Disability Act, including the requirement of reasonable accommodation. Or, to be even more careful, the legislature could state, in chapter 659A, the conditions that a medical marijuana user must meet to be entitled to the protections of the Oregon Disability Act without any reference to the Oregon Medical Marijuana Act. If the legislature took either of those actions, reasonable accommodation would not be tied to the provision of the Oregon Medical Marijuana Act that the majority finds to be of "no effect."

Although such changes could secure the right of reasonable accommodation for disabled persons who use medical marijuana in compliance with Oregon law, the changes would not eliminate the questions that the majority's analysis raises about the validity of other provisions of the Oregon Medical Marijuana Act that use words of authorization or about the reach of Oregon's legislative authority. If the majority decision simply

represents a formalistic view of the Supremacy Clause that permits Oregon to make its own choices about what conduct to punish (and thereby to permit) as long as it phrases its choices carefully, perhaps my concern is overstated. But as I cannot imagine that Congress would be concerned with the phrasing, rather than the effect, of state law, I not only think that the majority is wrong, I fear that it wrongly limits the legislative authority of this state. If it does, it not only limits the state's authority to make its own medical marijuana laws, it limits the state's authority to enact other laws that set standards of conduct different than the standards set by the federal government. Consider just one statute currently on the books—Oregon's Death with Dignity Act.

Oregon's Death with Dignity Act affirmatively authorizes physicians to use controlled substances to assist suicide.[10] In ***206** *Gonzales v. Oregon*, 546 U.S. 243, 126 S.Ct. 904, 163 L.Ed.2d 748 (2006), the Supreme Court considered the validity of a federal Interpretive Rule that provided that "using controlled substances to assist suicide is not a legitimate medical practice and that dispensing or prescribing them for this purpose is unlawful under the [Controlled Substances Act]." *Id.* at 249, 126 S.Ct. 904. The Supreme Court decided that the Interpretive Rule was invalid and did not decide whether the federal rule preempted the Oregon act. But if the federal government were to adopt a statute or a valid rule to the same effect, would this court hold that, because the Oregon Death with Dignity Act grants physicians permission to take actions that federal law prohibits, the state statute is preempted and of no effect? If so, the court would invalidate a state law using an analysis that at least three members of the Supreme Court have recognized to be faulty:

> "[T]he [Interpretive Rule] does not purport to pre-empt state law in any way, not even by conflict pre-emption—unless the Court is under the misimpression that some States *require* assisted suicide."
>
> *Gonzales*, 546 U.S. at 290, 126 S.Ct. 904 (Scalia, J., joined by Roberts, C.J. and Thomas, J., dissenting) (emphasis in original).

I do not understand why, in our system of dual sovereigns, Oregon must fly only in federal formation and not, as Oregon's motto provides, "with her own wings." ORS 186.040. Therefore, I cannot join in a decision by which we, as state court judges, enjoin the policies of our own state and preclude our legislature from making its own ****545** independent decisions about what conduct to criminalize. With respect, I dissent.

DURHAM, J., joins in this opinion.

All Citations

348 Or. 159, 230 P.3d 518, 159 Lab.Cas. P 60,980, 23 A.D. Cases 1, 60 A.L.R.6th 669

[10] ORS 127.815(1)(L)(A) authorizes physicians to dispense medications for the purpose of ending a patient's life in a humane and dignified manner when that patient has a terminal illness and has satisfied the written request requirements that the Act provides. ORS 127.805(1) authorizes a terminally ill patient to "make a written request for medication for the purpose of ending his or her life in a humane and dignified manner in accordance with [the Act]."

803 F.2d 746
United States Court of Appeals,
First Circuit.

Donald C. GRUBBA, Plaintiff, Appellant,
v.
BAY STATE ABRASIVES, DIVISION OF DRESSER INDUSTRIES, INC., Defendant, Appellee.

No. 86-1444.
|
Submitted Sept. 12, 1986.
|
Decided Oct. 20, 1986.

Former employee filed suit, alleging that employer had discharged him in violation of implied covenant of good faith and fair dealing and contrary to Article 114 of the Massachusetts Constitution. Employee also alleged handicap discrimination under the Rehabilitation Act and various tort and contract claims. The United States District Court, District of Massachusetts, John J. McNaught, J., granted employer's motion to dismiss claims, and employee appealed. The Court of Appeals, Coffin, Circuit Judge, held that: (1) employee's complaint, alleging that employer had required him to work without reasonable accommodation of his handicap and had ultimately discharged him based on age or handicap, did not state cause of action for employer's alleged violation of implied covenant of good faith and fair dealing, and (2) employee had other adequate way of vindicating rights under the Massachusetts Civil Rights Act, so that he could not sue directly under Massachusetts Constitution.

Affirmed.

Attorneys and Law Firms

***746** Frederick T. Golder and Golder & Shubow, P.A., Boston, Mass., on brief, for plaintiff, appellant.

Willis J. Goldsmith, Nancy C. Lee, Jones, Day, Reavis & Pogue, Washington, D.C., James W. Nagle and Goodwin, Procter & Hoar, Boston, Mass., on brief, for defendant, appellee.

Before CAMPBELL, Chief Judge, and COFFIN and BOWNES, Circuit Judges.

Opinion

COFFIN, Circuit Judge.

In December 1982, after a period of excessive absences from work, plaintiff-appellant Donald C. Grubba was discharged from his job as a senior chemist at Bay State Abrasives ("Bay State"). In April 1984, Grubba filed suit in the Worcester County Superior Court alleging that Bay State had breached the implied covenant of good faith and fair dealing by discharging ***747** him because of his age or physical handicaps. Grubba also brought tort and contract claims. Bay State removed the case to federal court on diversity grounds.

After Bay State moved to dismiss Grubba's claims, Grubba arguably asserted two additional bases for relief from Bay State's alleged handicap discrimination-the Rehabilitation Act of 1973, 29 U.S.C. §§ 793 & 794 (1982), and amendment article 114 of the Massachusetts constitution. The district court eventually dismissed all of plaintiff's claims.

In his brief on appeal, Grubba argues only that the district court erred in dismissing his handicap discrimination claims based upon the implied covenant of good faith and fair dealing and upon amendment article 114 of the Massachusetts constitution. For the reasons below, we affirm the district court's judgment on these two claims. Appellant has waived his other claims by failing to argue them in his brief. *Pignons S.A. de Mecanique v. Polaroid Corp.*, 701 F.2d 1 (1983).

I. The Implied Covenant of Good Faith and Fair Dealing

[1] Grubba contends that he has stated a claim for breach of the implied covenant of good faith and fair dealing because Bay State discharged him in violation of the Commonwealth's public policy against handicap discrimination. Grubba points to amendment article 114 of the Massachusetts constitution, which prohibits discrimination based on handicap "under any program or activity within the commonwealth," as evidence of this public policy.

Massachusetts does recognize a claim for breach of the implied covenant of good faith and fair dealing when a claimant shows that an employer's reason for discharge was contrary to public policy, *see Siles v. Travenol Laboratories, Inc.*, 13 Mass.App. 354, 433 N.E.2d 103, *review denied*, 386 Mass. 1103, 440 N.E.2d 1176 (1982), but this cause of action exists only when there is no other adequate way to vindicate the public policy. *Melley v. Gillette*, 19 Mass.App. 511, 475 N.E.2d 1227 (1985) (holding that a plaintiff may not bring a wrongful discharge claim against an employer on grounds of age discrimination without following the procedures of the comprehensive legislative scheme prohibiting age discrimination in employment, Mass.Gen.Laws Ann. ch. 151B § 4 (Supp.1986), *aff'd.*, 397 Mass. 1004, 491 N.E.2d 252 (1986)); *Crews v. Memorex Corporation*, 588 F.Supp. 27 (D.Mass.1984) (same). Because Massachusetts law provided another fully adequate means of vindicating its public policy against handicap discrimination in employment, the district court properly dismissed Grubba's wrongful discharge claim.[1]

[1] The district court apparently concluded that at the time Grubba was discharged, section 503 of the federal Rehabilitation Act of 1973, 29 U.S.C. § 793, provided an adequate remedy for handicap discrimination in employment, thereby precluding a common law action for breach of the implied covenant of good faith and fair dealing. We have some doubt as to whether this section, which provides no private cause of action and depends instead upon labor department enforcement, provided an adequate remedy for the discrimination Grubba alleged. *See Stewart v. Travelers Corp.*, 503 F.2d 108, 113 (9th Cir.1974) ("enforcement by the Department of Labor is ... problematic because any action by the Secretary is discretionary, not mandatory"); *Brown v. Transcon Lines*, 284 Or. 597, 558 P.2d 1087 (1978). We need not determine the adequacy of the federal remedy, however, for another ground supports the district court's dismissal of Grubba's wrongful discharge claim. *Chevron U.S.A. v. National Resources Defense Council*, 467 U.S. 837, 842 & nn. 7-8, 104 S.Ct. 2778, 2781 & nn. 7-8, 81 L.Ed.2d 694 ("this Court reviews judgments, not opinions").

The Massachusetts Civil Rights Act, Mass.Gen.Laws Ann. ch. 12 § 11I (Supp.1986), effective since 1979, provides a private cause of action for equitable, injunctive, and compensatory relief to "[a]ny person whose exercise or enjoyment of rights secured by ... the constitution or laws of the commonwealth, has been interfered with [by threats, intimidation, or coercion]." As appellant himself has argued, amendment article 114 of the Massachusetts constitution, which has no express state action limitation, "secure[s]" the right of handicapped persons against discrimination ***748** by private employers. *Cf. Bell v. Mazza*, 394 Mass. 176, 474 N.E.2d 1111 (holding that plaintiffs' rights under articles 1, 10, and 12 of the Declaration of Rights to the Massachusetts constitution are secured against individual as well as state action); *Batchelder v. Allied Stores Corp.*, 388 Mass. 83, 445 N.E.2d 590 (1983) (holding that article 9 of the Massachusetts constitution applies to the conduct of private persons). The Supreme Judicial Court has repeatedly instructed that "the protections of constitutional rights introduced in the Massachusetts Civil Rights Act may *not* be limited to State action." *Bell v. Mazza*, 394 Mass. at 181, 474 N.E.2d at 1114, quoting *United States Jaycees v. Massachusetts Commission Against Discrimination*, 391 Mass. 594, 609 n. 9, 463 N.E.2d 1151, 1160 n. 9 (1984) (emphasis in original). In light of the Supreme Judicial Court's instruction that the statutory language "threats, intimidation, and coercion" be liberally construed, *Batchelder v. Allied Stores Corp.*, 393 Mass. 819, 823, 473 N.E.2d 1128, 1131, we find that the alleged interference with Grubba's constitutional rights would have been sufficient to state a civil rights claim. Mass.Gen.Laws Ann. ch. 12 § 11H, 11I.[2] *See also Bell v. Mazza*, 394 Mass. at 182-84, 474 N.E.2d at 1115-16. Since the Massachusetts Civil Rights Act was the appropriate vehicle for relief from the violations of amendment article 114 that Grubba alleged, we affirm the dismissal of his common law wrongful discharge claim.

[2] Grubba stated in his affidavit that he received "threats about [his] absenteeism and about the possibility that [he] would loose [sic] [his] job." App. at 85. Grubba further alleged that Bay State required him to work without reasonable accommodation of his physical handicap and ultimately discharged him, preventing him from working at Bay State at all. These allegations amount to coercive interference with the protected right against handicap discrimination in employment.

II. Amendment Article 114 of the Massachusetts Constitution

[2] Grubba also argues that the district court erred in declining to imply a cause of action directly from amendment article 114 of the Massachusetts constitution. The district court did not address this constitutional claim, probably because plaintiff did not state it clearly below.[3]

[3] Our review of the record appendix has uncovered only two references to the state constitutional claim. App. at

58, 103-04. The reference to a remedy for handicap discrimination under "the State Constitution Article 114 and a common law action, inasmuch as it is a violation of public policy," App. at 58, is ambiguous. This quotation from Plaintiff's Opposition to Defendant's Motion to Dismiss could be read as invoking amendment article 114 only in support of the common law wrongful discharge claim rather than as an independent basis for relief. Any ambiguity is dispelled by plaintiff's written argument opposing dismissal, in which amendment article 114 is discussed solely in the context of the wrongful discharge claim. App. at 103-04.

While the Supreme Judicial Court has noted that "a person whose constitutional rights have been interfered with may be entitled to judicial relief even in the absence of a statute providing a procedural vehicle," *Phillips v. Youth Development Program, Inc.*, 390 Mass. 652, 657-58, 459 N.E.2d 453, 457 (1983), this observation is not relevant where, as here, the plaintiff has ignored the Massachusetts Civil Rights Act, a fully adequate procedural vehicle.[4] Thus, even if the constitutional claim was properly raised, we find no error in the district court's failure to recognize it.

[4] In the *Phillips* case the Supreme Judicial Court specifically noted that the Massachusetts Civil Rights Act was not in effect at the time the plaintiff was discharged. 390 Mass. at 657, 459 N.E.2d at 457.

The district court's judgment is affirmed.

All Citations

803 F.2d 746, 42 Fair Empl.Prac.Cas. (BNA) 148, 41 Empl. Prac. Dec. P 36,593, 55 USLW 2286, 105 Lab.Cas. P 55,628, 1 IER Cases 853

End of Document

355 P.3d 850
Court of Appeals of New Mexico.

Sandra LEWIS, Worker–Appellee,
v.
AMERICAN GENERAL MEDIA and Gallagher Bassett, Employer/Insurer–Appellant.

No. 33,236.
|
June 26, 2015.

Synopsis
Background: Employer and workers' compensation carrier appealed amended compensation order by the Workers' Compensation Administration, Terry S. Kramer, Workers' Compensation Judge, 2013 WL 6517277, challenging determination that claimant's use of medical marijuana constituted reasonable and necessary medical care that required reimbursement.

Holdings: The Court of Appeals, Wechsler, J., held that:

[1] Workers' Compensation Judge did not necessarily rely on unauthorized health care provider;

[2] substantial evidence supported conclusion that claimant's use of medical marijuana constituted reasonable and necessary medical care that required reimbursement; and

[3] order was not contrary to federal law or public policy.

Affirmed.

Attorneys and Law Firms

***851** Peter D. White, Santa Fe, NM, for Appellee.

Paul L. Civerolo, L.L.C., Paul L. Civerolo, Albuquerque, NM, for Appellant.

OPINION

WECHSLER, Judge.

{ 1} We are again called upon to address the application of the Workers' Compensation Act, NMSA 1978, §§ 52–1–1 to –70 (1929, as amended through 2013), to a worker certified to receive treatment with medical marijuana under the Lynn and Erin Compassionate Use Act (Compassionate Use Act), NMSA 1978, §§ 26–2B–1 to –7 (2007). In *Vialpando v. Ben's Automotive Services*, we held that the Workers' Compensation Act ***852** authorizes reimbursement for medical marijuana and declined to hold that federal law required a different result. 2014–NMCA–084, ¶¶ 1, 16, 331 P.3d 975, *cert. denied*, 331 P.3d 924 (2014). In *Maez v. Riley Industrial*, we considered the sufficiency of the evidence that supported reimbursement for medical marijuana for the worker in that case. 2015–NMCA–049, 347 P.3d 732.

{ 2} In this case, Gallagher Bassett and its insurer American General Media (collectively, Employer) challenge the sufficiency of the evidence supporting the conclusions of the Workers' Compensation Judge (WCJ) that the use of medical marijuana by Worker Sandra Lewis constituted reasonable and necessary medical care that required reimbursement. Specifically, Employer argues that the evidence offered by Worker's authorized health care provider was insufficient and that the WCJ erred by relying on testimony from an unauthorized health care provider who had provided a certification for Worker's use of medical marijuana under the Compassionate Use Act. Employer further argues that the conflict between New Mexico and federal law concerning the use of medical marijuana precludes the validity of the amended compensation order in this case. We hold that the medical certification forms and notes of Worker's authorized health care provider were substantial evidence to support the WCJ's conclusion that Worker's use of medical marijuana constitutes reasonable and necessary medical care and that, as discussed in *Vialpando*, the conflict between New Mexico and federal law does not support failing to give recognition to the amended compensation order. We therefore affirm.

BACKGROUND
{ 3} Worker suffered a compensable, work-related injury to her lower back in December 1998. She underwent several surgical procedures and currently suffers from post-laminectomy syndrome in the lumbar region. She suffers chronic pain. Since her injury, Worker has taken numerous drugs as part of her pain management, including Oxycontin, oxycodone, Soma,

Norflex, gabapentin, Lyrica, Percocet, fentanyl, and Zantac.

{ 4} The issues concerning Worker's treatment began on April 16, 2012, when Employer filed an application requesting an independent medical examination (IME) in order to determine the scope of reasonable and necessary treatment for Worker's condition. In its application, Employer stated that Worker had been using medical marijuana and taking prescribed pain medication, which was inconsistent with Worker's belief that medical marijuana "is now the most effective medication from all of her different treatment and she is concerned by potential side effects." The WCJ appointed Dr. Carl Adams, a psychologist, "to address Worker's ongoing pain management and use of pain medications." Dr. Adams' recommendations, issued September 17, 2012, supported Worker's request to use medical marijuana to control her pain as reasonable and appropriate.

{ 5} Worker was originally certified to participate in the New Mexico Department of Health Medical Cannabis Program (the program) on March 22, 2010. On July 31, 2012, Dr. Carlos Esparza, Worker's authorized health care provider, provided the written certification under the Compassionate Use Act for Worker to re-enroll in the program. As required by the Compassionate Use Act, Dr. Esparza certified that Worker had "debilitating" medical conditions (painful peripheral neuropathy and severe chronic pain) and that Worker had "current unrelieved symptoms that have failed other medical therapies." Dr. Esparza stated that the "benefits of medical marijuana outweigh the risk of hyper doses of narcotic medications."

{ 6} On May 30, 2013, Dr. Stephen I. Rosenberg, after a medical consultation as a second doctor required for certification of Worker's re-enrollment, also signed a certification form for Worker's re-enrollment in the program, listing Worker's condition as severe chronic pain and making essentially the same certifications as Dr. Esparza. On July 31, 2013, Joel Gelinas, a physician's assistant in Dr. Esparza's office, also signed a certification form for Worker's re-enrollment in the program. He listed Worker's condition as severe chronic pain and certified that Worker's condition was debilitating and that "standard ***853** treatments have failed to bring adequate relief."

{ 7} After trial, conducted on August 8, 2013, the WCJ found that Worker's authorized health care provider was Dr. Esparza and physician's assistant Joel Gelinas and that "the office of Dr. Esparza" had recommended Worker "as a candidate for medical marijuana under the Compassionate Use Act." The WCJ concluded that Worker's use of medical marijuana under the program constituted reasonable and necessary medical care and required Employer to reimburse Worker for the receipts she submitted for her certified purchases. Employer filed this appeal.

REASONABLE AND NECESSARY MEDICAL CARE

{ 8} As its first main argument, Employer challenges the sufficiency of the evidence supporting the WCJ's conclusion that Worker's use of medical marijuana constituted reasonable and necessary medical care. Employer asserts this challenge in two ways, arguing that (1) "[t]he record does not support [the WCJ's] finding that [W]orker was recommended as a candidate for medical marijuana under the [C]ompassionate [U]se [A]ct through the office of Dr. Esparza" and (2) the WCJ "went outside" the Workers' Compensation Act and interpreting case law "to rely on testimony by an unauthorized provider" to make its finding of reasonable and necessary care.

Testimony of an Unauthorized Provider

[1] { 9} We first address Employer's argument that the WCJ improperly relied on the testimony of an unauthorized health care provider in determining that Worker's use of medical marijuana constituted reasonable and necessary medical care. In this regard, Employer contends that because Worker needed the certification of two health care professionals to be able to use medical marijuana under the Compassionate Use Act, the WCJ necessarily relied on the certification of Dr. Rosenberg in the WCJ's determination of the necessity of medical marijuana care. Thus, according to Employer, the WCJ improperly considered the certification of Dr. Rosenberg who was not qualified to present testimony under the Workers' Compensation Act because he was neither Worker's authorized health care provider nor a health care provider authorized to perform an IME. *See* § 52–1–51(C) ("Only a health care provider who has treated the worker ... or the health care provider providing the independent medical examination ... may offer testimony at any workers' compensation hearing concerning the particular injury in question.").

{ 10} Employer's argument requires us to interpret the Workers' Compensation Act in connection with the Compassionate Use Act based on the facts of this case. We thus afford it de novo review. *Vialpando,* 2014–NMCA–084, ¶ 5, 331 P.3d 975.

{ 11} Employer's argument fatally interconnects the Workers' Compensation Act and the Compassionate Use Act. In order for a worker to qualify for medical care after a compensable injury under the Workers' Compensation Act, the care must be "reasonable and necessary" care from a health care provider. Section 52–1–49(A). Typically, in the event of a dispute between a worker and an employer pertaining to the reasonableness or necessity of medical care, a worker will establish that care was reasonable and necessary through evidence provided by a health care provider. *See DiMatteo v. Doña Ana Cnty.*, 1985–NMCA–099, ¶ 26, 104 N.M. 599, 725 P.2d 575 (stating under previous version of Workers' Compensation Act that the worker had the burden of proving that his medical expenses were reasonably necessary). The Workers' Compensation Act restricts testimony in this regard to either a treating health care provider or an independent medical examiner. Section 52–1–51(C).

{ 12} In order to qualify for medical marijuana under the Compassionate Use Act, "a person licensed in New Mexico to prescribe and administer" controlled substances must certify to the opinion that "the patient has a debilitating medical condition" as defined in the Compassionate Use Act and "the potential health benefits of the medical use of cannabis would likely outweigh the health risks for the patient." Section 26–2B–3(E), (H). Regulations promulgated by the New Mexico Department of Health require two written certifications when the debilitating ***854** medical condition is, as for Worker, severe chronic pain: one from a primary health care provider and one from a "specialist with expertise in pain management or ... expertise in the disease process that is causing the pain"). 7.34.3.8(B)(1)(b) NMAC (12/30/2010)[1].

{ 13} However, no statutory or regulatory provision connects these requirements under the two separate statutory schemes. Practically, a worker first must be enrolled in the medical marijuana program under the Compassionate Use Act before any issue can arise under the Workers' Compensation Act as to whether medical marijuana use is reasonable and necessary care. But, otherwise, the two determinations are not dependent on each other; they are made separately, at different times, and by different administrative authorities. No express provision of the Workers' Compensation Act grants a WCJ the authority to review a Department of Health enrollment determination. *See Jones v. Holiday Inn Express*, 2014–NMCA–082, ¶ 19, 331 P.3d 992 ("Since the [Workers' Compensation Administration] is a creature of the Legislature, [the Court] cannot expand the [Workers' Compensation Administration's] jurisdiction over matters unless the Legislature expressly granted the [Workers' Compensation Administration] jurisdiction or jurisdiction can be found by necessary implication.").

{ 14} Thus, although the Department of Health requires that a person obtain two written certifications in order to be enrolled in the program and receive medical marijuana for severe chronic pain, the Workers' Compensation Act has no such quantitative requirements for a WCJ to determine that medical care is reasonable and necessary. Indeed, the Workers' Compensation Act contemplates that fewer, rather than more, professionals will provide input by restricting testimony to treating providers and independent medical examiners. Section 52–1–51(C). Nor does the Workers' Compensation Act require, as Employer urges, that a WCJ make a determination that a worker enrolled in the Medical Cannabis Program was properly eligible for medical marijuana use. The Compassionate Use Act and its associated regulations control the manner in which that determination is made, and the Department of Health bears the responsibility of approving applications for enrollment in the Medical Cannabis Program. *See* § 26–2B–7(G) (providing that the Department of Health shall issue registry identification cards for the Medical Cannabis Program to patients who submit applications in accordance with the Department's rules); *see also* 7.34.3.7(JJ) (12/30/2010) (defining "registry identification card" as "a document issued by the department which identifies a qualified patient authorized to engage in the use of cannabis for a debilitating medical condition" (internal quotation marks omitted)). All that is required by the Workers Compensation Act is that the WCJ determine, based on evidence from one or more authorized health care providers, whether a worker's medical treatment for a work injury is reasonable and necessary. Section 52–1–51.

{ 15} The facts of this case are illustrative. Dr. Esparza and Joel Gelinas were Worker's authorized health care provider. The evidence included their certifications for Worker's participation in the Medical Cannabis Program and use of medical marijuana as well as their related medical notes. Dr. Rosenberg, who was not an authorized health care provider under the Workers' Compensation Act, also submitted a written certification in support of Worker's enrollment in the program. *See* § 52–1–49 (stating the manner for selection of an authorized health care provider).

{ 16} Although Dr. Rosenberg's certification may have been necessary for Worker's enrollment in the program, it was unnecessary evidence to establish the reasonableness and necessity of Worker's medical care because Dr. Rosenberg was not an authorized health care provider.

Thus, Employer argues that Worker's medical marijuana treatment could not be considered medically necessary because the WCJ could not consider the certification of Dr. Rosenberg as an unauthorized health care provider in meeting the eligibility requirements of the Compassionate ***855** Use Act.[2] However, even though the administrative regulations promulgated by the Department of Health pursuant to the Compassionate Use Act may require more than one certification for the condition of severe chronic pain, nothing in the Workers' Compensation Act requires evidence from more than one health care provider in order to establish the reasonableness and necessity of medical care. Worker was enrolled in the Medical Cannabis Program; it was not the role of the WCJ to second-guess that determination, and the issue is not before us. In this regard, the only pertinent issue in this appeal is whether Worker presented substantial evidence to the WCJ for the WCJ to determine that medical marijuana use was reasonable and necessary medical care.

[2] Employer also intimates on appeal that Dr. Rosenberg's certification could not support Worker's enrollment in the program because he was not Worker's primary physician. Employer, however, does not indicate the manner in which such an issue was preserved before the WCJ. "To preserve a question for review it must appear that a ruling or decision" below was fairly invoked. Rule 12–216(A) NMRA.

Sufficiency of the Evidence

[2] [3] [4] [5] [6] { 17} We thus turn to whether substantial evidence supported the WCJ's conclusion, taking into account Employer's arguments concerning the receipt in evidence of Dr. Rosenberg's certification.[3] We review for substantive evidence under a whole record standard of review. *Dewitt v. Rent–A–Center, Inc.*, 2009–NMSC–032, ¶ 12, 146 N.M. 453, 212 P.3d 341. "Whole record review contemplates a canvass by the reviewing court of all the evidence bearing on a finding or decision, favorable and unfavorable, in order to determine if there is substantial evidence to support the result." *Leonard v. Payday Prof'l*, 2007–NMCA–128, ¶ 10, 142 N.M. 605, 168 P.3d 177 (alteration, internal quotation marks, and citation omitted). Substantial evidence is evidence that demonstrates "the reasonableness of an agency's decision, and we neither reweigh the evidence nor replace the fact finder's conclusions with our own." *Dewitt*, 2009–NMSC–032, ¶ 12, 146 N.M. 453, 212 P.3d 341 (citation omitted). We give deference to the factfinder and will not disturb the WCJ's findings on appeal if they are supported by substantial evidence on the record as a whole. *Herman v. Miners' Hosp.*, 1991–NMSC–021, ¶ 6, 111 N.M. 550, 807 P.2d 734.

[3] The certification forms of Dr. Esparza, Dr. Rosenberg, and Joel Gelinas were all received in evidence over Employer's objection.

{ 18} The certification forms from both Dr. Esparza and Joel Gelinas stated that Worker suffered from severe chronic pain and that other treatment had not worked. Specifically, Dr. Esparza stated that the benefits of medical marijuana would "outweigh the risk of hyper doses of narcotic medications."

{ 19} Employer points to the medical notes of Dr. Esparza and Joel Gelinas and contends that they are equivocal statements and that the opinions expressed are not "of medical reasonableness and necessity." Dr. Esparza's July 17, 2012 medical notes state that Worker informed him that she had reduced her use of prescribed medications because she had been using medical marijuana. Dr. Esparza stated that "it would be reasonable for us to drop some of these narcotic medications in place of the medical marijuana if that is helping her. I would be happy to fill out her form for this." In Joel Gelinas' July 31, 2012 medical note, he observes that Worker stated that she needed a referral to her primary care doctor "so that [her use of medical marijuana] could be associated with her work injury." Worker was concerned that she was "using the marijuana to medically control her pain, which is related to her workers' compensation injury." Joel Gelinas noted that he told Worker that he would discuss the request with Dr. Esparza but that "[w]e generally do not refer patients to their primary care doctor for evaluation for a workers' compensation injury."

{ 20} When considered as a whole, the medical certification forms and notes of Dr. Esparza and Joel Gelinas are substantial evidence supporting the WCJ's determination. The medical certification forms certify Worker for enrollment in the program and clearly state that other treatments, that included narcotic medications, have failed. The medical certification forms are the functional ***856** equivalents of prescriptions. *Vialpando*, 2014–NMCA–084, ¶ 12, 331 P.3d 975. Further, Dr. Esparza expressly states in his note that "it would be reasonable" to replace some of Worker's narcotic medications if the medical marijuana was helping her and that he would be happy to complete her certification. We do not consider this language to be equivocal in view of Dr. Esparza's issuing the certification.

{ 21} Joel Gelinas' medical note does not detract from his certification. The practice of Dr. Esparza's office, by

which Dr. Esparza and Joel Gelinas would not refer Worker to her primary physician in order to link Worker's use of medical marijuana to her work injury, does not impact the determination of whether Worker's use of medical marijuana is reasonable and necessary medical care. Dr. Esparza and Joel Gelinas were Worker's authorized health care provider who medically treated Worker; they were under no obligation to assist Worker with her legal claim. We assume that they issued their certifications in the good faith medical belief that Worker's use of medical marijuana would benefit her medical treatment. *Cf. Maez,* 2015–NMCA–049, ¶ 29, 347 P.3d 732 (holding that medical care was reasonable and necessary where the evidence did not support the inference that a health care provider failed to exercise medical judgment in certifying a worker for the Compassionate Use Act program). The fact that they did not refer Worker to her primary physician does not indicate that they did not have such a belief.

{ 22} Employer also argues that Dr. Esparza "would not have prescribed a controlled substance to [W]orker because it defies logic that a doctor holding a valid license would jeopardize himself or his patient by recommending illegal use of a controlled substance." According to Employer, Dr. Esparza's "discomfort with recommending or prescribing medical marijuana is underscored by his refusal to provide [W]orker with a referral to another doctor, even though she requested this referral." We are unpersuaded by this speculation. First, and significantly, Employer makes no reference to the record in support of his attributions to Dr. Esparza. *See* Rule 12–213(A)(4) NMRA (requiring an appellant to provide citations to the record proper in support of each argument); *see also Fenner v. Fenner*, 1987–NMCA–066, ¶ 28, 106 N.M. 36, 738 P.2d 908 (holding that the Court need not consider arguments raised on appeal that are unsupported by record citations). Second, although federal law prohibits prescribing marijuana for medical use, the Compassionate Use Act specifically contemplates the use of medical marijuana in New Mexico as a form of medical treatment for certain conditions. 21 U.S.C. § 812 (2012); *see Gonzales v. Raich*, 545 U.S. 1, 27, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005) (stating that "by characterizing marijuana as a Schedule I drug, Congress expressly found that the drug has no acceptable medical uses"); Sections 26–2B–2 to –7. Third, Joel Gelinas' note is much too unclear to reach a conclusion that Dr. Esparza had adopted any office policy regarding referral of patients to their primary care doctors "for evaluation of a workers' compensation injury" because of any concern about medical marijuana.

{ 23} We also do not believe that the testimony of Dr. Adams undercuts the WCJ's conclusion that medical marijuana constituted reasonable and necessary medical care. Dr. Adams, a psychologist, recommended in his IME report that he supported Worker's "request to begin medical cannabis use to control her pain" and that "her request seems reasonable and appropriate." In his deposition testimony, he again stated that he thought that medical marijuana was reasonable and advisable for treatment of Worker's pain. Although Dr. Adams did not state, as Employer contends, that "Worker's use of medical marijuana was a medical necessity," the absence of such testimony does not demonstrate that the WCJ's conclusion is unsupported by substantial evidence based on the evidence as a whole.

CONFLICT WITH FEDERAL LAW

[7] { 24} Employer additionally argues that the WCJ's order requiring it to reimburse Worker raises a conflict between federal and state law and that, with such conflict, the federal law preempts state law, rendering the WCJ's order without effect. This argument presents an issue of law that ***857** we review on a de novo basis. *See Largo v. Atchison, Topeka & Santa Fe Ry. Co.*, 2002–NMCA–021, ¶ 5, 131 N.M. 621, 41 P.3d 347 (stating that federal preemption is a question of law that the Court reviews de novo).

{ 25} We agree with Employer that the Controlled Substances Act (CSA), 21 U.S.C. §§ 801–904 (2012) conflicts with the Compassionate Use Act in that the CSA does not except marijuana used for medical purposes from its prohibition of possession or distribution of even small amounts of marijuana. 21 U.S.C. §§ 812, 822, 823(f); *Gonzales*, 545 U.S. at 27, 125 S.Ct. 2195 (stating that the CSA "designates marijuana as contraband for *any* purpose"). In *Vialpando*, we recognized that "the Supremacy Clause dictates that any conflict between the Compassionate Use Act and the CSA would be resolved in favor of the CSA." *Vialpando*, 2014–NMCA–084, ¶ 15, 331 P.3d 975.

{ 26} Nonetheless, we declined to reverse the WCJ's order in *Vialpando* based on either federal law or public policy, observing that the employer had not demonstrated that the order would have required it to violate a federal statute and that federal public policy was ambiguous in contrast with New Mexico's clear public policy expressed in the Compassionate Use Act. *Id.* ¶¶ 15–16. Employer would distinguish *Vialpando* on two grounds: (1) a second memorandum issued by the United States Department of Justice (Department of Justice) subsequent to the memorandum discussed in *Vialpando* indicates that New Mexico law does not meet the standard

contemplated by the Department of Justice; and (2) in contrast to *Vialpando*, Employer has identified the federal statute that would embrace Employer's activity in carrying out the WCJ's order.

{ 27} As to the initial memorandum, in *Vialpando* we discussed the memorandum from James M. Cole, Deputy Attorney General, to All United States Attorneys, entitled Guidance Regarding Marijuana Enforcement, dated August 29, 2013. *Vialpando*, 2014–NMCA–084, ¶ 16, 331 P.3d 975. We noted that the memorandum was not dispositive, but included "equivocal statements about state laws allowing marijuana use for medical and even recreational purposes." *Id.* We observed that, although the memorandum affirmed that the CSA declared marijuana to be illegal and that federal prosecutors would continue to enforce the CSA, the memorandum identified eight areas of enforcement priority that did not include medical marijuana. *Id.* ¶ 16 n. 1. Beyond those priorities, the memorandum indicated that the Department of Justice "would generally defer to state and local authorities." *Id.* ¶ 16.

{ 28} According to Employer, the New Mexico statutory and regulatory scheme is not sufficient to satisfy Department of Justice requirements that justify deference to state law. Employer points to language in the second memorandum that indicates that the Department of Justice's position "rested on the expectation that states that have enacted laws authorizing marijuana-related conduct will implement clear, strong and effective regulatory and enforcement systems in order to minimize the threat posed to federal enforcement priorities." Memorandum from James M. Cole, Deputy Attorney General, to All United States Attorneys, Guidance Regarding Marijuana Financial Related Crimes (February 14, 2014).

{ 29} More particularly, Employer argues that the Workers' Compensation Act and the Compassionate Use Act do not meet the standard set forth in the second memorandum. However, as we stated in *Vialpando*, the New Mexico Legislature adopted the Compassionate Use Act "to allow the beneficial use of medical cannabis in a regulated system for alleviating symptoms caused by debilitating medical conditions and their medical treatments." 2014–NMCA–084, ¶ 16, 331 P.3d 975 (quoting Section 26–2B–2 (internal quotation marks omitted)). It is not clear the manner in which any deficiency in this system is an issue in this case, and Employer's arguments in this regard are not specific.

{ 30} Employer seems to fault the WCJ for failing to provide oversight for Worker's purchase and use of medical marijuana by failing to provide a mechanism by which Worker would be responsible for demonstrating her purchases are consistent with law or that would allow Employer to investigate "the ***858** legitimacy" of Worker's purchases. But, the WCJ's amended compensation order requires Employer's reimbursement only upon Worker submitting timely receipts for medical marijuana "purchased consistent with law." Worker demonstrated that she was a certified participant in the medical marijuana program. If Employer is not satisfied that Worker is submitting "legitimate" receipts, Employer has recourse through the Workers' Compensation Act and the Workers' Compensation Administration. *See* NMSA 1978, § 52–10–1(A) (1990) (requiring that a health care provider release to an employer or employer's insurer, upon request, medical bills related to medical care service provided to a worker); *see also* NMSA 1978, § 52–5–1.3 (2013) (requiring the Workers' Compensation Administration's Enforcement Bureau to investigate fraudulent conduct concerning the payment of benefits to a worker).

{ 31} To the extent that Employer argues that the New Mexico laws and regulations are not sufficient to obviate Employer's exposure to violation of federal law, its argument overlaps with the second aspect of its argument to distinguish *Vialpando*—that it has identified its continued federal exposure. According to Employer, if it were to follow the WCJ's order, and despite the Department of Justice's memoranda, it would be civilly responsible for violation of the CSA by way of conspiracy or aiding and abetting. As distinguished from *Vialpando*, Employer cites the federal statutes it believes would implicate him, 21 U.S.C. § 841A(a) (prohibiting a person from knowingly possessing a controlled substance as defined by federal law and in an amount specified by the United States Attorney General); 21 U.S.C. § 846 (prohibiting a person from attempting or conspiring to commit a violation of federal law related to controlled substances under 21 U.S.C., Chapter 13, Subchapter 1); 18 U.S.C. § 2(a) (2012) ("Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.").

{ 32} However, Employer's argument raises only speculation in view of existing Department of Justice and federal policy. Nothing in the Department of Justice's second memorandum alters its position regarding the areas of enforcement set forth in the initial memorandum. Medical marijuana is not within the list. Moreover, on December 16, 2014, the Consolidated and Further Appropriations Act of 2015 to fund the operations of the federal government was enacted. It states that "[n]one of

the funds made available in this Act to the Department of Justice may be used, with respect to the [s]tates of ... New Mexico, ..., to prevent such States from implementing their own State laws that authorize the use, distribution, possession or cultivation of medical marijuana." We reach the same conclusion that we did in *Vialpando.* In view of the equivocal federal policy and the clear New Mexico policy as expressed in the Compassionate Use Act, we decline to reverse the WCJ's amended compensation order.

CONCLUSION

{ 33} We affirm the amended compensation order.

{ 34} **IT IS SO ORDERED.**

WE CONCUR: RODERICK T. KENNEDY and M. MONICA ZAMORA, Judges.

All Citations

355 P.3d 850, 2015 -NMCA- 090

Footnotes

FN1. Section 7.34.3 NMAC was amended in 2015. The previous version (12/30/2010) is cited in this Opinion because it is applicable to the pending case.

347 P.3d 732
Court of Appeals of New Mexico.

Miguel MAEZ, Worker–Appellant,
v.
RILEY INDUSTRIAL and Chartis,
Employer/Insurer–Appellees.

No. 33,154.
|
Jan. 13, 2015.

Synopsis

Background: Workers' compensation claimant was awarded benefits for two compensable injuries to his lumbar spine. The Workers' Compensation Administration, David L. Skinner, J., determined that medical marijuana was not reasonable and necessary medical care. Claimant appealed.

[Holding:] The Court of Appeals, Wechsler, J., held that evidence supported finding that medical marijuana constituted reasonable and necessary medical care.

Reversed.

Attorneys and Law Firms

***732** Titus & Murphy Law Firm, Victor A. Titus, Farmington, NM, for Appellant.

Hoffman Kelley Lopez LLP, Lori A. Martinez, Albuquerque, NM, for Appellees.

OPINION

WECHSLER, Judge.

{ 1} In *Vialpando v. Ben's Automotive Services*, 2014–NMCA–084, ¶ 1, 331 P.3d 975, *cert. denied*, 331 P.3d 924 (2014), this Court held that the Workers' Compensation Act, NMSA 1978, §§ 52–1–1 to –70 (1929, as amended through 2013), authorizes reimbursement for medical marijuana used pursuant to the Lynn and Erin Compassionate Use Act (Compassionate Use Act), NMSA 1978, §§ 26–2B–1 to –7 (2007). The workers' ***733** compensation judge in *Vialpando* had found that the worker was qualified to participate in the Department of Health Medical Cannabis Program authorized by the Compassionate Use Act and that such treatment would be reasonable and necessary medical care. 2014–NMCA–084, ¶ 1, 331 P.3d 975.

{ 2} In this appeal, the workers' compensation judge (WCJ) found that the worker's authorized treating health care provider (HCP) did not prescribe medical marijuana and concluded that medical marijuana was not reasonable and necessary medical care. Worker Miguel Maez argues that the WCJ erred in this conclusion because Worker had proven that medical marijuana was reasonable and necessary medical care, particularly based on the evidence that the HCP's treatment plan for Worker included medical marijuana, and the HCP and another doctor had certified Worker's use of medical marijuana as required by the Compassionate Use Act.

{ 3} Because there is not substantial evidence supporting the WCJ's conclusion that medical marijuana was not reasonable and necessary medical care for Worker, we reverse the WCJ's compensation order.

I. BACKGROUND

{ 4} Worker suffered two compensable injuries to his lumbar spine in the course and scope of his employment with Riley Industrial on February 14, 2011 and March 4, 2011. Riley Industrial was insured by Chartis (both referred to as Employer herein). Worker was entitled to payment of temporary disability until the date of maximum medical improvement and permanent partial disability thereafter based on a seven percent whole body impairment for the balance of the 500–week benefit period. He was also entitled to ongoing reasonable and necessary medical care. His authorized HCP was Dr. Anthony Reeve.

{ 5} The WCJ found that "Dr. Reeve did not prescribe medical marijuana to Worker" and concluded that "[m]edical marijuana is not reasonable and necessary medical care from an authorized HCP" that would require payment by Employer. Worker appeals from the WCJ's compensation order to the extent that the WCJ did not award medical benefits for Worker's use of medical marijuana for pain management.

II. REASONABLE AND NECESSARY MEDICAL CARE

A. Issue on Appeal

{ 6} On appeal, Worker initially makes arguments concerning the interrelationship of the Workers' Compensation Act and the Compassionate Use Act that are similar to those we decided in *Vialpando.* In *Vialpando,* filed after Worker filed his brief-in-chief in this case, we determined that medical marijuana treatment approved under the Compassionate Use Act that the WCJ found to be reasonable and necessary medical care qualifies for reimbursement under the Workers' Compensation Act. *Vialpando,* 2014–NMCA–084, ¶ 1, 331 P.3d 975.

{ 7} The WCJ in this case did not find Worker's medical marijuana treatment to be reasonable and necessary medical care. To the contrary, the WCJ specifically concluded that "[m]edical marijuana is not reasonable and necessary medical care from an authorized HCP." Worker argues that the WCJ erred in reaching this conclusion because the evidence indicated that medical marijuana is reasonable care for Worker's chronic low back pain and because the WCJ incorrectly found that medical marijuana was not "prescribed" by Dr. Reeve.

{ 8} The Workers' Compensation Act requires an employer to provide a worker "reasonable and necessary health care services from a health care provider." Section 52–1–49(A). Conversely, an employer need not provide a worker with health care that is not reasonable and necessary. *See Vargas v. City of Albuquerque,* 1993–NMCA–136, ¶ 8, 116 N.M. 664, 866 P.2d 392 ("[T]he employer's obligation is limited by Section 52–1–49(A) to paying for 'reasonable and necessary' health care services"). Thus, the pivotal question in Worker's appeal is whether the evidence supports the WCJ's conclusion that medical marijuana was not reasonable and necessary medical care.

*734 B. Standard of Review

[1] { 9} We address this question under a whole record standard of review by determining whether substantial evidence in the record as a whole supports the WCJ's conclusion. *Dewitt v. Rent–A–Center, Inc.,* 2009–NMSC–032, ¶ 12, 146 N.M. 453, 212 P.3d 341. Substantial evidence is credible evidence in light of the whole record "that is sufficient for a reasonable mind to accept as adequate to support the conclusion[.]" *Id.* (internal quotation marks and citation omitted). We give deference to the WCJ as factfinder and view the evidence in the light most favorable to the decision without disregarding contravening evidence. *Id.*

[2] [3] [4] { 10} While we generally may not weigh the evidence, even under whole record review, such review "allows the reviewing court greater latitude to determine whether a finding of fact was reasonable based on the evidence [.]" *Herman v. Miners' Hosp.,* 1991–NMSC–021, ¶ 10, 111 N.M. 550, 807 P.2d 734. Moreover, our review has even greater latitude when reviewing an issue for which the evidence is documentary in nature. As in this case, when "all or substantially all of the evidence on a material issue is documentary or by deposition," an appellate court may "examine and weigh it[.]" *United Nuclear Corp. v. Gen. Atomic Co.,* 1979–NMSC–036, ¶ 62, 93 N.M. 105, 597 P.2d 290 (internal quotation marks and citation omitted). In review for substantial evidence of such a record from a district court proceeding, the appellate court must then give "some weight to the findings of the trial judge on such issue" and not disturb such findings based on conflicting evidence "unless such findings are manifestly wrong or clearly opposed to the evidence." *Id.* (internal quotation marks and citation omitted). In this case, in which we are applying whole record review, we must similarly give weight to the WCJ's findings and consider contravening evidence. *Dewitt,* 2009–NMSC–032, ¶ 12, 146 N.M. 453, 212 P.3d 341. Following *United Nuclear,* we will not disturb the WCJ's findings unless they are manifestly wrong or clearly opposed to the evidence. 1979–NMSC–036, 93 N.M. 105, 597 P.2d 290. ¶ 69.

[5] { 11} We apply a de novo standard to the WCJ's application of law to the facts. *Vialpando,* 2014–NMCA–084, ¶ 5, 331 P.3d 975.

C. Review of the Evidence

{ 12} Dr. Reeve provided the evidence concerning the issue of whether medical marijuana constituted reasonable and necessary medical care. He testified by deposition. He made detailed medical reports of each of Worker's visits, and the reports were included as exhibits to his deposition.

{ 13} Dr. Reeve began treating Worker on June 13, 2011. He testified that his diagnosis of Worker included chronic back pain and that he treated Worker with medication for pain management. Over the course of Worker's treatment, Dr. Reeve had injected Worker with Toradol and had prescribed Soma, Ultram, Sprix, Percocet, Lortab (oxycodone), and hydrocodone for Worker's pain. Dr. Reeve also referred Worker to another

doctor for spinal injections. During one test required for pain management patients, Worker tested positive for marijuana. Dr. Reeve informed Worker that if Worker was going to take marijuana, he needed to have a license for Dr. Reeve to continue administering other narcotics, and further, even if Worker had a license, he would probably consider only additional nonnarcotic pain medication.

{ 14} On February 28, 2012, Dr. Reeve first saw Worker for a medical marijuana evaluation. In his medical report, Dr. Reeve states that Worker has had spinal injections and chronic pain management and that Worker "has failed traditional pain management and is a candidate for the cannabis program." At that time, Dr. Reeve was treating Worker with hydrocodone. His report concludes with the following:

> **IMPRESSION**
>
> 1. Lumbar radiculopathy.
>
> 2. Chronic low back pain.
>
> 3. Failed traditional management.
>
> **REHABILITATION MANAGEMENT AND SUGGESTIONS**
>
> I have reviewed the records and examined the patient. The history, radiographic and ***735** physical findings are consistent at this time. I will recommend authorization of medical marijuana as a trial. Authorization is good for one year and the patient will need to show symptomatic progress upon reauthorization.
>
> **TREATMENT PLAN**
>
> Authorization for medical marijuana for one year.

{ 15} Dr. Reeve re-authorized Worker for the medical marijuana program after an evaluation on April 3, 2013. Similarly, Dr. Reeve again stated in his report that Worker had "failed traditional pain management and is a candidate for the cannabis program." He stated the same "IMPRESSION" and "REHABILITATION MANAGEMENT AND SUGGESTIONS" as he had on February 28, 2012. His "TREATMENT PLAN" stated "Reauthorization for medical marijuana for one year."

{ 16} The Compassionate Use Act requires for enrollment that "a person licensed in New Mexico to prescribe and administer drugs that are subject to the Controlled Substances Act" provide a "written certification" that "the patient has a debilitating medical condition" and that the person certifying "believes that the potential health benefits of the medical use of cannabis would likely outweigh the health risks for the patient." Section 26–2B–3(E), (H). Dr. Reeve signed the certification for Worker to 3 qualify for the Compassionate Use Act medical marijuana program. The original certification is not part of the record on appeal. Dr. Reeve also signed the certification re-enrolling Worker in the program. In that certification, in addition to the statutory requirements stated above, Dr. Reeve further certified that Worker "has current unrelieved symptoms that have failed other medical therapies."

{ 17} At his deposition, Dr. Reeve was asked: "And because you signed for [medical marijuana], do you believe that it is an appropriate medical treatment for [Worker's] herniated disk?" Dr. Reeve responded:

> Well, I think I need to be really clear on this issue. What happens is patients are going to use the cannabis [marijuana] either one way or the other. He already tested positive for it. And so I explain to patients, "If you're going to use cannabis, you should probably have a license for it because people will suspect you of using it ultimately, and you can always pass a preemployment screen or other tests if you have a license for it." And if patients request that I sign it, I will sign for them, but I'm not recommending or distributing or in any way advocating for the use of medical cannabis.

1. Necessity of a Prescription

[6] { 18} Worker contends that the WCJ erred in his conclusion that medical marijuana does not constitute reasonable and necessary medical care because Dr. Reeve did not "prescribe" medical marijuana for Worker. The WCJ found that Dr. Reeve did not prescribe medical marijuana to Worker and further found that "Employer is not liable for the purchase of medical marijuana based on the fact that the medical marijuana is not being prescribed by the authorized HCP, Dr. Reeve." The Workers' Compensation Administration regulations adopted pursuant to NMSA 1978, Section 52–4–5 (1993) and NMSA 1978, Section 52–5–4 (2003) applicable at the time Worker filed his application defined "prescription drug" as a drug requiring "a written order from an authorized HCP for dispensing by a licensed pharmacist or authorized HCP." 11.4.7.7(OO) NMAC (12/31/2011). But, as we stated in *Vialpando*, medical marijuana is not a prescription drug. 2014–NMCA–084, ¶ 11, 331 P.3d 975. Moreover, as we further stated in *Vialpando*, the certification required under the Compassionate Use Act by a person licensed in New Mexico to prescribe and

administer controlled substances is the functional equivalent of a prescription. *Id.* ¶ 12; see § 26–2B–3(E), (H). We thus agree with Worker that the fact that Dr. Reeve did not provide Worker a prescription as defined in the regulations does not support the WCJ's conclusion that medical marijuana was not reasonable and necessary medical care for Worker.

2. Conclusion Regarding Reasonable Medical Care

[7] { 19} As we have stated, to the extent that the WCJ based his conclusion that medical ***736** marijuana was not reasonable and necessary medical care on his finding that Dr. Reeve did not prescribe medical marijuana for Worker, the WCJ's conclusion is based on a faulty premise. Employer argues that the evidence in the record nevertheless supports the WCJ's conclusion. We therefore turn to the other evidence to determine whether it supports the conclusion that medical marijuana was not reasonable and necessary medical care for Worker.

{ 20} We discuss the two aspects of the WCJ's conclusion separately. With regard to whether medical marijuana was reasonable medical care for Worker, we have little difficulty concluding that the evidence as a whole does not support the WCJ's conclusion. Regardless of whether Worker requested treatment with medical marijuana, Dr. Reeve had treated Worker with traditional pain management that had failed. He adopted a treatment plan based on medical marijuana. He would not have done so if it were an unreasonable medical treatment. The evidence does not support a conclusion that Dr. Reeve did not believe medical marijuana to be a reasonable treatment for Worker.

3. Conclusion Regarding Necessary Medical Care

{ 21} The aspect concerning necessary medical care is more difficult. Dr. Reeve did not testify that the medical marijuana treatment was necessary for Worker's care. Rather, when asked in his deposition whether he believed it was appropriate medical treatment because he had signed for it, Dr. Reeve stated that Worker was using marijuana, that such patients need a license for such use, and that he will sign for them if he is requested. He specified that in doing so he was not recommending 2 marijuana use. He also considered the medical marijuana program to be a patient's decision "as it's private and voluntary and it's not overseen by a physician."

{ 22} The WCJ decided from this evidence that medical marijuana was not necessary medical care for Worker. The question before us is whether there was substantial evidence for the WCJ to reach this conclusion. Under our standard of review, we must defer to the finder of fact and view the evidence in the most favorable light to the decision without disregarding contravening evidence.

[8] { 23} Worker had the burden to establish that medical marijuana was a necessary medical treatment. *See DiMatteo v. Doña Ana Cnty.*, 1985–NMCA–099, ¶ 26, 104 N.M. 599, 725 P.2d 575 (stating under previous version of Workers' Compensation Act that the worker had the burden of proving that his medical expenses were reasonably necessary). The evidence indicates that Dr. Reeve considered traditional pain management to have failed and planned to treat Worker with medical marijuana. Dr. Reeve also testified, however, that medical marijuana treatment is a patient's decision and that he will adopt it on a patient's request. The question before us distills to whether, considering all the evidence, the WCJ could reasonably have concluded that medical marijuana was not necessary medical care because Dr. Reeve merely acceded to Worker's choice and adopted medical marijuana as his treatment plan because Worker had begun to use it on his own.

{ 24} We begin with the contravening evidence. Dr. Reeve's medical reports clearly state that he had treated Worker with traditional pain management and that such treatment had failed. The medical reports further state that Dr. Reeve was adopting medical marijuana as his treatment plan and would recommend its use for Worker. Dr. Reeve did so, certifying in Worker's re-enrollment form that Worker had "unrelieved symptoms that have failed other medical therapies." We consider this evidence to clearly establish that medical marijuana was necessary for Worker's treatment because (1) traditional pain management had failed and (2) it would not be possible for Dr. Reeve to institute or carry out his treatment plan without medical marijuana.

{ 25} To support the WCJ's conclusion and to consider the evidence in the light most favorable to the WCJ's conclusion, we must be able to infer from Dr. Reeve's deposition testimony, as argued by Employer, that medical marijuana treatment was entirely Worker's ***737** choice and that Dr. Reeve certified Worker for the medical marijuana program only because Worker intended to use it regardless and asked Dr. Reeve for the certification. In this regard, Dr. Reeve testified that Worker had tested positive for marijuana, that patients use marijuana "either one way or the other[,]" and that he will sign for patients if requested. He further stated that he was "not recommending or distributing or in any way advocating for the use of medical cannabis."

{ 26} But, even reading this evidence in the light most favorable to the WCJ's decision, we do not consider this testimony to be inconsistent with Dr. Reeve's medical records. There is no conflict in the evidence that Dr. Reeve addressed medical marijuana as a treatment for Worker because Worker had used marijuana and tested positive for it. Nor do we question that Dr. Reeve pursued medical marijuana as a treatment plan because Worker requested it. Dr. Reeve's testimony also indicates that, in adopting his treatment plan, he did not recommend medical marijuana to Worker or advocate its use. Dr. Reeve did not distribute medical marijuana to Worker. *See* Section 26–2B–4(E) (stating that a practitioner may not be subject to arrest, prosecution, or penalty for distributing medical marijuana under the Compassionate Use Act).

{ 27} We must focus on the question at issue—whether medical marijuana was necessary medical care for Worker. The facts that Dr. Reeve did not initiate or recommend to Worker such care are not dispositive. Regardless of whether he took such action or was merely "passive," as Employer contends, Dr. Reeve adopted a treatment plan that called for medical marijuana. By the very nature of such treatment, medical marijuana was a necessary component. Dr. Reeve then recommended Worker for receipt of medical marijuana by his certification. He did so, even though at Worker's request, because traditional pain management was not successful for Worker.

{ 28} Perhaps most significantly, we cannot accept the contention, albeit implied, that Dr. Reeve would certify Worker for medical marijuana use solely on Worker's request regardless of whether it was appropriate for Worker's medical care. Marijuana is a controlled substance. The Compassionate Use Act makes an exception to the contraband use of marijuana only when necessary for medical treatment. *See* § 26–2B–2 ("The purpose of the [Compassionate Use Act] is to allow the beneficial use of medical cannabis in a regulated system for alleviating symptoms caused by debilitating medical conditions and their medical treatments."). Of course, a patient must wish to participate in the Compassionate Use Act program, but that law does not contemplate that individuals who wish to receive marijuana may do so merely upon request; it requires the certification by a professional. Nor does it contemplate that this professional certification will be issued in an irresponsible fashion. Dr. Reeve was familiar with the Compassionate Use Act program and testified that he was "one of only two doctors that I know of in the state that will sign for the medical cannabis[.]" We cannot infer from Dr. Reeve's testimony that he would certify Worker for the Compassionate Use Act program without exercising his medical judgment. Indeed, to the contrary, his medical records describe in detail the basis for his exercise of his medical judgment.

{ 29} We additionally note that Dr. Reeve re-examined Worker on April 3, 2013 and re-authorized Worker for the Compassionate Use Act program. Dr. Reeve certified at that time that Worker continued to meet the eligibility requirements for the program and that Worker "has current unrelieved symptoms that have failed other medical therapies." This certification underscores Worker's need for medical marijuana therapy.

{ 30} We thus read the evidence in the record as a whole as failing to support and as clearly opposed to the WCJ's conclusion that medical marijuana was not reasonable and necessary medical care.

III. WORKER'S REFUSAL OF REASONABLE AND NECESSARY MEDICAL CARE

{ 31} Employer also argues that, if medical marijuana is reasonable and necessary medical care, Employer should not be responsible ***738** to reimburse it because Worker refused the reasonable and necessary medical care that Dr. Reeve was providing to him. We address this argument because, if Employer is correct, we could affirm the WCJ's compensation order because it is right for a reason that it does not address. *See Davis v. Los Alamos Nat'l Lab.*, 1989–NMCA–023, ¶ 18, 108 N.M. 587, 775 P.2d 1304 (stating that we will affirm the decision of a workers' compensation order if it is right for any reason).

{ 32} However, we do not agree with Employer. Employer's argument is premised on its position that:

> It was Worker's own choice, and not Dr. Reeve's professional judgment of what constituted reasonable and necessary care, that first motivated the medical use of marijuana. Dr. Reeve's rationale for signing for the medical cannabis was not that he wasn't providing reasonable and necessary care, but rather that Worker was going to use marijuana regardless of whether Worker was taking narcotic pain medication.

{ 33} As we have discussed, however, the substantial evidence in the record as a whole does not support the

proposition that Dr. Reeve certified Worker for medical marijuana treatment merely because Worker had made that choice. The record, which includes Dr. Reeve's medical reports, does not support a conclusion that traditional pain medication was the sole reasonable and necessary treatment, precluding any other.

IV. CONCLUSION

{ 34} Substantial evidence in the record as a whole does not support the WCJ's conclusion that medical marijuana was not reasonable and necessary medical care. We therefore reverse the WCJ's compensation order.

{ 35} **IT IS SO ORDERED.**

WE CONCUR: CYNTHIA A. FRY and MICHAEL E. VIGIL, Judges.

All Citations

347 P.3d 732, 2015 -NMCA- 049

End of Document

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Michigan Compiled Laws Annotated
Chapter 333. Health
Michigan Medical Marihuana Act (Refs & Annos)

M.C.L.A. 333.26424

333.26424. Protections for the medical use of marihuana

Effective: December 20, 2016

Currentness

Sec. 4. (a) A qualifying patient who has been issued and possesses a registry identification card is not subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including, but not limited to, civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of marihuana in accordance with this act, provided that the qualifying patient possesses an amount of marihuana that does not exceed a combined total of 2.5 ounces of usable marihuana and usable marihuana equivalents, and, if the qualifying patient has not specified that a primary caregiver will be allowed under state law to cultivate marihuana for the qualifying patient, 12 marihuana plants kept in an enclosed, locked facility. Any incidental amount of seeds, stalks, and unusable roots shall also be allowed under state law and shall not be included in this amount. The privilege from arrest under this subsection applies only if the qualifying patient presents both his or her registry identification card and a valid driver license or government-issued identification card that bears a photographic image of the qualifying patient.

(b) A primary caregiver who has been issued and possesses a registry identification card is not subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for assisting a qualifying patient to whom he or she is connected through the department's registration process with the medical use of marihuana in accordance with this act. The privilege from arrest under this subsection applies only if the primary caregiver presents both his or her registry identification card and a valid driver license or government-issued identification card that bears a photographic image of the primary caregiver. This subsection applies only if the primary caregiver possesses marihuana in forms and amounts that do not exceed any of the following:

(1) For each qualifying patient to whom he or she is connected through the department's registration process, a combined total of 2.5 ounces of usable marihuana and usable marihuana equivalents.

(2) For each registered qualifying patient who has specified that the primary caregiver will be allowed under state law to cultivate marihuana for the qualifying patient, 12 marihuana plants kept in an enclosed, locked facility.

(3) Any incidental amount of seeds, stalks, and unusable roots.

(c) For purposes of determining usable marihuana equivalency, the following shall be considered equivalent to 1 ounce of usable marihuana:

(1) 16 ounces of marihuana-infused product if in a solid form.

(2) 7 grams of marihuana-infused product if in a gaseous form.

(3) 36 fluid ounces of marihuana-infused product if in a liquid form.

(d) A person shall not be denied custody or visitation of a minor for acting in accordance with this act, unless the person's behavior is such that it creates an unreasonable danger to the minor that can be clearly articulated and substantiated.

(e) There is a presumption that a qualifying patient or primary caregiver is engaged in the medical use of marihuana in accordance with this act if the qualifying patient or primary caregiver complies with both of the following:

(1) Is in possession of a registry identification card.

(2) Is in possession of an amount of marihuana that does not exceed the amount allowed under this act. The presumption may be rebutted by evidence that conduct related to marihuana was not for the purpose of alleviating the qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition, in accordance with this act.

(f) A registered primary caregiver may receive compensation for costs associated with assisting a registered qualifying patient in the medical use of marihuana. Any such compensation does not constitute the sale of controlled substances.

(g) A physician shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by the Michigan board of medicine, the Michigan board of osteopathic medicine and surgery, or any other business or occupational or professional licensing board or bureau, solely for providing written certifications, in the course of a bona fide physician-patient relationship and after the physician has completed a full assessment of the qualifying patient's medical history, or for otherwise stating that, in the physician's professional opinion, a patient is likely to receive therapeutic or palliative benefit from the medical use of marihuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms associated with the serious or debilitating medical condition, provided that nothing shall prevent a professional licensing board from sanctioning a physician for failing to properly evaluate a patient's medical condition or otherwise violating the standard of care for evaluating medical conditions.

(h) A person shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for providing a registered qualifying patient or a registered primary caregiver with marihuana paraphernalia for purposes of a qualifying patient's medical use of marihuana.

(i) Any marihuana, marihuana paraphernalia, or licit property that is possessed, owned, or used in connection with the medical use of marihuana, as allowed under this act, or acts incidental to such use, shall not be seized or forfeited.

(j) A person shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, solely for being in the presence or vicinity of the medical use of marihuana in accordance with this act, or for assisting a registered qualifying patient with using or administering marihuana.

(k) A registry identification card, or its equivalent, that is issued under the laws of another state, district, territory, commonwealth, or insular possession of the United States that allows the medical use of marihuana by a visiting qualifying patient, or to allow a person to assist with a visiting qualifying patient's medical use of marihuana, shall have the same force and effect as a registry identification card issued by the department.

(*l*) Any registered qualifying patient or registered primary caregiver who sells marihuana to someone who is not allowed the medical use of marihuana under this act shall have his or her registry identification card revoked and is guilty of a felony punishable by imprisonment for not more than 2 years or a fine of not more than $2,000.00, or both, in addition to any other penalties for the distribution of marihuana.

(m) A person shall not be subject to arrest, prosecution, or penalty in any manner or denied any right or privilege, including, but not limited to, civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for manufacturing a marihuana-infused product if the person is any of the following:

(1) A registered qualifying patient, manufacturing for his or her own personal use.

(2) A registered primary caregiver, manufacturing for the use of a patient to whom he or she is connected through the department's registration process.

(n) A qualifying patient shall not transfer a marihuana-infused product or marihuana to any individual.

(o) A primary caregiver shall not transfer a marihuana-infused product to any individual who is not a qualifying patient to whom he or she is connected through the department's registration process.

Credits

2008, Initiated Law 1, § 4, Eff. Dec. 4, 2008. Amended by P.A.2012, No. 512, Eff. April 1, 2013; P.A.2016, No. 283, Eff. Dec. 20, 2016.

Notes of Decisions (72)

M. C. L. A. 333.26424, MI ST 333.26424
The statutes are current through P.A.2016, No. 563 of the 2016 Regular Session, 98th Legislature.

End of Document

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Michigan Compiled Laws Annotated
Chapter 421. Employment Security
Michigan Employment Security Act (Refs & Annos)

M.C.L.A. 421.29

421.29. Disqualification from benefits

Effective: October 29, 2013

Currentness

Sec. 29. (1) Except as provided in subsection (5), an individual is disqualified from receiving benefits if he or she:

(a) Left work voluntarily without good cause attributable to the employer or employing unit. An individual who left work is presumed to have left work voluntarily without good cause attributable to the employer or employing unit. An individual who is absent from work for a period of 3 consecutive work days or more without contacting the employer in a manner acceptable to the employer and of which the individual was informed at the time of hire shall be considered to have voluntarily left work without good cause attributable to the employer. An individual who becomes unemployed as a result of negligently losing a requirement for the job of which he or she was informed at the time of hire shall be considered to have voluntarily left work without good cause attributable to the employer. An individual claiming benefits under this act has the burden of proof to establish that he or she left work involuntarily or for good cause that was attributable to the employer or employing unit. An individual claiming to have left work involuntarily for medical reasons must have done all of the following before the leaving: secured a statement from a medical professional that continuing in the individual's current job would be harmful to the individual's physical or mental health; unsuccessfully attempted to secure alternative work with the employer; and unsuccessfully attempted to be placed on a leave of absence with the employer to last until the individual's mental or physical health would no longer be harmed by the current job. However, if any of the following conditions is met, the leaving does not disqualify the individual:

(*i*) The individual has an established benefit year in effect and during that benefit year leaves unsuitable work within 60 days after the beginning of that work. Benefits paid after a leaving under this subparagraph shall not be charged to the experience account of the employer the individual left, but shall be charged instead to the nonchargeable benefits account.

(*ii*) The individual is the spouse of a full-time member of the United States armed forces, and the leaving is due to the military duty reassignment of that member of the United States armed forces to a different geographic location. Benefits paid after a leaving under this subparagraph shall not be charged to the experience account of the employer the individual left, but shall be charged instead to the nonchargeable benefits account.

(*iii*) The individual is concurrently working part-time for an employer or employing unit and for another employer or

employing unit and voluntarily leaves the part-time work while continuing work with the other employer. The portion of the benefits paid in accordance with this subparagraph that would otherwise be charged to the experience account of the part-time employer that the individual left shall not be charged to the account of that employer, but shall be charged instead to the nonchargeable benefits account.

(b) Was suspended or discharged for misconduct connected with the individual's work or for intoxication while at work.

(c) Failed without good cause to apply diligently for available suitable work after receiving notice from the unemployment agency of the availability of that work or failed to apply for work with employers that could reasonably be expected to have suitable work available.

(d) Failed without good cause while unemployed to report to the individual's former employer or employing unit within a reasonable time after that employer or employing unit provided notice of the availability of an interview concerning available suitable work with the former employer or employing unit.

(e) Failed without good cause to accept suitable work offered to the individual or to return to the individual's customary self-employment, if any, when directed by the employment office or the unemployment agency. An employer that receives a monetary determination under section 32[1] may notify the unemployment agency regarding the availability of suitable work with the employer on the monetary determination or other form provided by the unemployment agency. Upon receipt of the notice of the availability of suitable work, the unemployment agency shall notify the claimant of the availability of suitable work. Until 1 year after the effective date of the amendatory act that added this sentence,[2] an individual is considered to have refused an offer of suitable work if the prospective employer requires as a condition of the offer a drug test that is subject to the same terms and conditions as a drug test administered under subdivision (m), and the employer withdraws the conditional offer after either of the following:

(*i*) The individual tests positive for a controlled substance and lacks a valid, documented prescription, as defined in section 17708 of the public health code, 1978 PA 368, MCL 333.17708, for the controlled substance issued to the individual by his or her treating physician.

(*ii*) The individual refuses without good cause to submit to the drug test.

(f) Lost his or her job due to absence from work resulting from a violation of law for which the individual was convicted and sentenced to jail or prison. This subdivision does not apply if conviction of an individual results in a sentence to county jail under conditions of day parole as provided in 1962 PA 60, MCL 801.251 to 801.258, or if the conviction was for a traffic violation that resulted in an absence of less than 10 consecutive work days from the individual's place of employment.

(g) Is discharged, whether or not the discharge is subsequently reduced to a disciplinary layoff or suspension, for participation in either of the following:

(*i*) A strike or other concerted action in violation of an applicable collective bargaining agreement that results in curtailment of work or restriction of or interference with production.

(*ii*) A wildcat strike or other concerted action not authorized by the individual's recognized bargaining representative.

(h) Was discharged for an act of assault and battery connected with the individual's work.

(i) Was discharged for theft connected with the individual's work.

(j) Was discharged for willful destruction of property connected with the individual's work.

(k) Committed a theft after receiving notice of a layoff or discharge, but before the effective date of the layoff or discharge, resulting in loss or damage to the employer who would otherwise be chargeable for the benefits, regardless of whether the individual qualified for the benefits before the theft.

(*l*) Was employed by a temporary help firm, which as used in this section means an employer whose primary business is to provide a client with the temporary services of 1 or more individuals under contract with the employer, to perform services for a client of that firm if each of the following conditions is met:

(*i*) The temporary help firm provided the employee with a written notice before the employee began performing services for the client stating in substance both of the following:

(A) That within 7 days after completing services for a client of the temporary help firm, the employee is under a duty to notify the temporary help firm of the completion of those services.

(B) That a failure to provide the temporary help firm with notice of the employee's completion of services pursuant to sub-subparagraph (A) constitutes a voluntary quit that will affect the employee's eligibility for unemployment compensation should the employee seek unemployment compensation following completion of those services.

(*ii*) The employee did not provide the temporary help firm with notice that the employee had completed his or her services for the client within 7 days after completion of his or her services for the client.

(m) Was discharged for illegally ingesting, injecting, inhaling, or possessing a controlled substance on the premises of the employer; refusing to submit to a drug test that was required to be administered in a nondiscriminatory manner; or testing

positive on a drug test, if the test was administered in a nondiscriminatory manner. If the worker disputes the result of the testing, and if a generally accepted confirmatory test has not been administered on the same sample previously tested, then a generally accepted confirmatory test shall be administered on that sample. If the confirmatory test also indicates a positive result for the presence of a controlled substance, the worker who is discharged as a result of the test result will be disqualified under this subdivision. A report by a drug testing facility showing a positive result for the presence of a controlled substance is conclusive unless there is substantial evidence to the contrary. As used in this subdivision and subdivision (e):

(*i*) "Controlled substance" means that term as defined in section 7104 of the public health code, 1978 PA 368, MCL 333.7104.

(*ii*) "Drug test" means a test designed to detect the illegal use of a controlled substance.

(*iii*) "Nondiscriminatory manner" means administered impartially and objectively in accordance with a collective bargaining agreement, rule, policy, a verbal or written notice, or a labor-management contract.

(n) Theft from the employer that resulted in the employee's conviction, within 2 years of the date of the discharge, of theft or a lesser included offense.

(2) A disqualification under subsection (1) begins the week in which the act or discharge that caused the disqualification occurs and continues until the disqualified individual requalifies under subsection (3).

(3) After the week in which the disqualifying act or discharge described in subsection (1) occurs, an individual who seeks to requalify for benefits is subject to all of the following:

(a) For benefit years established before October 1, 2000, the individual shall complete 6 requalifying weeks if he or she was disqualified under subsection (1)(c), (d), (e), (f), (g), or (*l*), or 13 requalifying weeks if he or she was disqualified under subsection (1)(h), (i), (j), (k), or (m). A requalifying week required under this subdivision is each week in which the individual does any of the following:

(*i*) Earns or receives remuneration in an amount at least equal to an amount needed to earn a credit week, as that term is defined in section 50.[3]

(*ii*) Otherwise meets all of the requirements of this act to receive a benefit payment if the individual were not disqualified under subsection (1).

(*iii*) Receives a benefit payment based on credit weeks subsequent to the disqualifying act or discharge.

(b) For benefit years established before October 1, 2000, if the individual is disqualified under subsection (1)(a) or (b), he or she shall requalify, after the week in which the disqualifying discharge occurred by earning in employment for an employer liable under this act or the unemployment compensation act of another state an amount equal to, or in excess of, 7 times the individual's potential weekly benefit rate, calculated on the basis of employment with the employer involved in the disqualification, or by earning in employment for an employer liable under this act or the unemployment compensation act of another state an amount equal to, or in excess of, 40 times the state minimum hourly wage times 7, whichever is the lesser amount.

(c) For benefit years established before October 1, 2000, a benefit payable to an individual disqualified under subsection (1)(a) or (b) shall be charged to the nonchargeable benefits account, and not to the account of the employer with whom the individual was involved in the disqualification.

(d) For benefit years beginning on or after October 1, 2000, after the week in which the disqualifying act or discharge occurred, an individual shall complete 13 requalifying weeks if he or she was disqualified under subsection (1)(c), (d), (e), (f), (g), or (*l*), or 26 requalifying weeks if he or she was disqualified under subsection (1)(h), (i), (j), (k), (m), or (n). A requalifying week required under this subdivision is each week in which the individual does any of the following:

(*i*) Earns or receives remuneration in an amount equal to at least 1/13 of the minimum amount needed in a calendar quarter of the base period for an individual to qualify for benefits, rounded down to the nearest whole dollar.

(*ii*) Otherwise meets all of the requirements of this act to receive a benefit payment if the individual was not disqualified under subsection (1).

(e) For benefit years beginning on or after October 1, 2000 and beginning before April 26, 2002, if the individual is disqualified under subsection (1)(a) or (b), he or she shall requalify, after the week in which the disqualifying act or discharge occurred by earning in employment for an employer liable under this act or the unemployment compensation law of another state at least the lesser of the following:

(*i*) Seven times the individual's weekly benefit rate.

(*ii*) Forty times the state minimum hourly wage times 7.

(f) For benefit years beginning on or after April 26, 2002, if the individual is disqualified under subsection (1)(a), he or she shall requalify, after the week in which the disqualifying act or discharge occurred by earning in employment for an employer liable under this act or the unemployment compensation law of another state at least 12 times the individual's weekly benefit rate.

(g) For benefit years beginning on or after April 26, 2002, if the individual is disqualified under subsection (1)(b), he or she shall requalify, after the week in which the disqualifying act or discharge occurred by earning in employment for an employer liable under this act or the unemployment compensation law of another state at least 17 times the individual's weekly benefit rate.

(h) A benefit payable to the individual disqualified or separated under disqualifying circumstances under subsection (1)(a) or (b), shall be charged to the nonchargeable benefits account, and not to the account of the employer with whom the individual was involved in the separation. Benefits payable to an individual determined by the unemployment agency to be separated under disqualifying circumstances shall not be charged to the account of the employer involved in the disqualification for any period after the employer notifies the unemployment agency of the claimant's possible ineligibility or disqualification. However, an individual filing a new claim for benefits who reports the reason for separation from a base period employer as a voluntary leaving shall be presumed to have voluntarily left without good cause attributable to the employer and shall be disqualified unless the individual provides substantial evidence to rebut the presumption. If a disqualifying act or discharge occurs during the individual's benefit year, any benefits that may become payable to the individual in a later benefit year based on employment with the employer involved in the disqualification shall be charged to the nonchargeable benefits account.

(4) The maximum amount of benefits otherwise available under section 27(d)[4] to an individual disqualified under subsection (1) is subject to all of the following conditions:

(a) For benefit years established before October 1, 2000, if the individual is disqualified under subsection (1)(c), (d), (e), (f), (g), or (*l*) and the maximum amount of benefits is based on wages and credit weeks earned from an employer before an act or discharge involving that employer, the amount shall be reduced by an amount equal to the individual's weekly benefit rate as to that employer multiplied by the lesser of either of the following:

(*i*) The number of requalifying weeks required of the individual under this section.

(*ii*) The number of weeks of benefit entitlement remaining with that employer.

(b) If the individual has insufficient or no potential benefit entitlement remaining with the employer involved in the disqualification in the benefit year in existence on the date of the disqualifying determination, a reduction of benefits described in this subsection applies in a succeeding benefit year with respect to any benefit entitlement based upon credit weeks earned with the employer before the disqualifying act or discharge.

(c) For benefit years established before October 1, 2000, an individual disqualified under subsection (1)(h), (i), (j), (k), or (m) is not entitled to benefits based on wages and credit weeks earned before the disqualifying act or discharge with the employer involved in the disqualification.

(d) The benefit entitlement of an individual disqualified under subsection (1)(a) or (b) is not subject to reduction as a result of that disqualification.

(e) A denial or reduction of benefits under this subsection does not apply to benefits based upon multiemployer credit weeks.

(f) For benefit years established on or after October 1, 2000, if the individual is disqualified under subsection (1)(c), (d), (e), (f), (g), or (*l*), the maximum number of weeks otherwise applicable in calculating benefits for the individual under section 27(d) shall be reduced by the lesser of the following:

(*i*) The number of requalifying weeks required of the individual under this section.

(*ii*) The number of weeks of benefit entitlement remaining on the claim.

(g) For benefit years beginning on or after October 1, 2000, the benefits of an individual disqualified under subsection (1)(h), (i), (j), (k), (m), or (n) shall be reduced by 13 weeks and any weekly benefit payments made to the claimant thereafter shall be reduced by the portion of the payment attributable to base period wages paid by the base period employer involved in a disqualification under subsection (1)(h), (i), (j), (k), (m), or (n).

(5) If an individual leaves work to accept permanent full-time work with another employer or to accept a referral to another employer from the individual's union hiring hall and performs services for that employer, or if an individual leaves work to accept a recall from a former employer, all of the following apply:

(a) Subsection (1) does not apply.

(b) Wages earned with the employer whom the individual last left, including wages previously transferred under this subsection to the last employer, for the purpose of computing and charging benefits, are wages earned from the employer with whom the individual accepted work or recall, and benefits paid based upon those wages shall be charged to that employer.

(c) When issuing a determination covering the period of employment with a new or former employer described in this subsection, the unemployment agency shall advise the chargeable employer of the name and address of the other employer, the period covered by the employment, and the extent of the benefits that may be charged to the account of the chargeable employer.

(6) In determining whether work is suitable for an individual, the unemployment agency shall consider the degree of risk involved to the individual's health, safety, and morals, the individual's physical fitness and prior training, the individual's length of unemployment and prospects for securing local work in the individual's customary occupation, and the distance of the available work from the individual's residence. Additionally, the unemployment agency shall consider the individual's

experience and prior earnings, but an unemployed individual who refuses an offer of work determined to be suitable under this section shall be denied benefits if the pay rate for that work is at least 70% of the gross pay rate he or she received immediately before becoming unemployed. Beginning January 15, 2012, after an individual has received benefits for 50% of the benefit weeks in the individual's benefit year, work shall not be considered unsuitable because it is outside of the individual's training or experience or unsuitable as to pay rate if the pay rate for that work meets or exceeds the minimum wage; is at least the prevailing mean wage for similar work in the locality for the most recent full calendar year for which data are available as published by the department of technology, management, and budget as "wages by job title", by standard metropolitan statistical area; and is 120% or more of the individual's weekly benefit amount.

(7) Work is not suitable and benefits shall not be denied under this act to an otherwise eligible individual for refusing to accept new work under any of the following conditions:

(a) If the position offered is vacant due directly to a strike, lockout, or other labor dispute.

(b) If the remuneration, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality.

(c) If as a condition of being employed, the individual would be required to join a company union or to resign from or refrain from joining a bona fide labor organization.

(8) All of the following apply to an individual who seeks benefits under this act:

(a) An individual is disqualified from receiving benefits for a week in which the individual's total or partial unemployment is due to either of the following:

(*i*) A labor dispute in active progress at the place at which the individual is or was last employed, or a shutdown or start-up operation caused by that labor dispute.

(*ii*) A labor dispute, other than a lockout, in active progress or a shutdown or start-up operation caused by that labor dispute in any other establishment within the United States that is both functionally integrated with the establishment described in subparagraph (*i*) and operated by the same employing unit.

(b) An individual's disqualification imposed or imposable under this subsection is terminated if the individual performs services in employment with an employer in at least 2 consecutive weeks falling wholly within the period of the individual's total or partial unemployment due to the labor dispute, and in addition earns wages in each of those weeks in an amount equal to or greater than the individual's actual or potential weekly benefit rate.

(c) An individual is not disqualified under this subsection if the individual is not directly involved in the labor dispute. An individual is not directly involved in a labor dispute unless any of the following are established:

(*i*) At the time or in the course of a labor dispute in the establishment in which the individual was then employed, the individual in concert with 1 or more other employees voluntarily stopped working other than at the direction of the individual's employing unit.

(*ii*) The individual is participating in, financing, or directly interested in the labor dispute that causes the individual's total or partial unemployment. The payment of regular union dues, in amounts and for purposes established before the inception of the labor dispute, is not financing a labor dispute within the meaning of this subparagraph.

(*iii*) At any time a labor dispute in the establishment or department in which the individual was employed does not exist, and the individual voluntarily stops working, other than at the direction of the individual's employing unit, in sympathy with employees in some other establishment or department in which a labor dispute is in progress.

(*iv*) The individual's total or partial unemployment is due to a labor dispute that was or is in progress in a department, unit, or group of workers in the same establishment.

(d) As used in this subsection, "directly interested" shall be construed and applied so as not to disqualify individuals unemployed as a result of a labor dispute the resolution of which may not reasonably be expected to affect their wages, hours, or other conditions of employment, and to disqualify individuals whose wages, hours, or conditions of employment may reasonably be expected to be affected by the resolution of the labor dispute. A "reasonable expectation" of an effect on an individual's wages, hours, or other conditions of employment exists, in the absence of a substantial preponderance of evidence to the contrary, in any of the following situations:

(*i*) If it is established that there is in the particular establishment or employing unit a practice, custom, or contractual obligation to extend within a reasonable period to members of the individual's grade or class of workers in the establishment in which the individual is or was last employed changes in terms and conditions of employment that are substantially similar or related to some or all of the changes in terms and conditions of employment that are made for the workers among whom there exists the labor dispute that has caused the individual's total or partial unemployment.

(*ii*) If it is established that 1 of the issues in or purposes of the labor dispute is to obtain a change in the terms and conditions of employment for members of the individual's grade or class of workers in the establishment in which the individual is or was last employed.

(*iii*) If a collective bargaining agreement covers both the individual's grade or class of workers in the establishment in which the individual is or was last employed and the workers in another establishment of the same employing unit who are actively participating in the labor dispute, and that collective bargaining agreement is subject by its terms to modification, supplementation, or replacement, or has expired or been opened by mutual consent at the time of the labor dispute.

(e) In determining the scope of the grade or class of workers, evidence of the following is relevant:

(*i*) Representation of the workers by the same national or international organization or by local affiliates of that national or international organization.

(*ii*) Whether the workers are included in a single, legally designated, or negotiated bargaining unit.

(*iii*) Whether the workers are or within the past 6 months have been covered by a common master collective bargaining agreement that sets forth all or any part of the terms and conditions of the workers' employment, or by separate agreements that are or have been bargained as a part of the same negotiations.

(*iv*) Any functional integration of the work performed by those workers.

(*v*) Whether the resolution of those issues involved in the labor dispute as to some of the workers could directly or indirectly affect the advancement, negotiation, or settlement of the same or similar issues in respect to the remaining workers.

(*vi*) Whether the workers are currently or have been covered by the same or similar demands by their recognized or certified bargaining agent or agents for changes in their wages, hours, or other conditions of employment.

(*vii*) Whether issues on the same subject matter as those involved in the labor dispute have been the subject of proposals or demands made upon the employing unit that would by their terms have applied to those workers.

(9) Notwithstanding subsections (1) to (8), if the employing unit submits notice to the unemployment agency of possible ineligibility or disqualification beyond the time limits prescribed by unemployment agency rule and the unemployment agency concludes that benefits should not have been paid, the claimant shall repay the benefits paid during the entire period of ineligibility or disqualification. The unemployment agency shall not charge interest on repayments required under this subsection.

(10) An individual is disqualified from receiving benefits for any week or part of a week in which the individual has received, is receiving, or is seeking unemployment benefits under an unemployment compensation law of another state or of the United States. If the appropriate agency of the other state or of the United States finally determines that the individual is not entitled to unemployment benefits, the disqualification described in this subsection does not apply.

Credits

Amended by P.A.1980, No. 358, § 1, Eff. March 1, 1981; P.A.1982, No. 535, § 1, Eff. Jan. 2, 1983; P.A.1983, No. 164, § 1, Imd. Eff. July 24, 1983; P.A.1994, No. 162, § 1, Imd. Eff. June 17, 1994; P.A.1995, No. 25, § 1, Eff. March 28, 1996; P.A.2002, No. 192, Imd. Eff. April 26, 2002; P.A.2008, No. 480, Imd. Eff. Jan. 12, 2009; P.A.2011, No. 269, Imd. Eff. Dec. 19, 2011; P.A.2013, No. 146, Imd. Eff. Oct. 29, 2013.

Notes of Decisions (358)

Footnotes

1 M.C.L.A. § 421.32.

2 P.A.2013, No. 146, Imd. Eff. Oct. 29, 2013.

3 M.C.L.A. § 421.50.

4 M.C.L.A. § 421.27.

M. C. L. A. 421.29, MI ST 421.29
The statutes are current through P.A.2016, No. 563 of the 2016 Regular Session, 98th Legislature.

End of Document

Persons with Disabilities in the Workplace Guidelines

Table of Contents

Laws & Guidelines

Employment Discrimination Guidelines

804 CMR 03.00

Employment Discrimination Based on Age

Employment Discrimination Based on a Criminal Record

Criminal Offender Record: Procedure Reforms

See All

I. Introduction

In 1983, the Massachusetts Legislature amended the Fair Employment Practices Law to prohibit discrimination in employment on the basis of handicap. [1]These guidelines are intended to assist employers, labor organizations, employment agencies and persons with handicaps, and their lawyers, in understanding what employment practices are lawful or unlawful and what steps must be taken to accommodate handicapped persons. The standards governing employment practices with regard to handicapped persons are part of the statutory and regulatory framework governing fair employment practices under Mass. Gen. L. ch. 151B and Mass. Regs. Code tit. 804, § 3.00 et. seq. These guidelines are issued pursuant to Mass. Gen. L. ch. 151B, section 2.[2]

II. Definitions

A. Handicapped Person

1. Statutory Definition
   Chapter 151B defines a "handicapped person" as any person who "(a) [has] a physical or mental impairment which substantially limits one or more major life activities . . . (b) [has] a record of such impairment; or (c) [is] regarded as having such impairment." Mass. Gen. L. ch. 151B, sections 1(16), (17).

2. Impairment
   An impairment is a physiological disorder affecting one or more of a number of body systems, or a mental or psychological disorder. The following conditions, for example, are not impairments: environmental, cultural, and economic disadvantages; homosexuality, bisexuality and other sexual orientation; normal pregnancy; personality traits that are not caused by mental or psychological disorders; normal deviations in height, weight, or strength; the current, illegal use of a controlled substance, or the nondependent use of alcohol.

3. Record of Impairment
   A person is considered to be "handicapped" if s/he has a past record or medical history of a physical or mental impairment that substantially limited one or more major life activities, even though the impairment may no longer exist. For example, a person who was treated for cancer five years earlier but who has been cancer-free since that time may still be entitled to protection under the law as a "handicapped person."

4. Regarded as Having an Impairment/Perceived Handicaps
   An individual is considered to be "handicapped," even if s/he has no physical or mental impairment that substantially limits one or more major life activities, if the individual is regarded as having such an impairment. For example, a person who has high blood pressure or a spinal defect or is morbidly obese might have no functional impairments, but may be "handicapped" if their employer regards such condition as a health risk or believes that hiring him/her will increase employee group insurance rates.

5. Major Life Activities
   The term "major life activities" includes, but is not limited to, caring for one's self, performing manual tasks,

walking, seeing, hearing, speaking, breathing, learning and working. Mass. Gen. L. ch. 151B, section 1(20). Other examples of major life activities include sitting, standing, lifting and mental and emotional processes such as thinking, concentrating and interacting with others.

6. Substantially Limits
   An impairment is substantially limiting if it prohibits or significantly restricts an individual's ability to perform a major life activity as compared to the ability of the average person in the general population to perform the same activity. The determination of whether an impairment substantially limits a major life activity depends on the nature and severity of the impairment, the duration or expected duration of the impairment, and the permanent or long-term impact of the impairment. An impairment substantially limits an individual's ability to work if it prevents or significantly restricts the individual from performing a class of jobs or a broad range of jobs in various classes. Chronic or episodic disorders that are substantially limiting may be handicaps; isolated medical problems (such as a broken arm that heals normally) and illnesses of short duration usually are not handicaps.[3]

7. Mitigating Measures
   The existence of an impairment is generally determined without regard to whether its effect can be mitigated by measures such as medication, auxiliary aids or prosthetic devices. For example, an employee who is legally blind, but whose vision is correctable with glasses, may be considered "handicapped" because his impairment substantially limits his ability to perform the major life activity of seeing. Similarly, an employee with a serious mental illness that affects her ability to work in a broad range of jobs may be considered "handicapped," even if the symptoms of the mental illness can be mitigated or eliminated by medication.

8. Illnesses
   Individuals with illnesses, such as hepatitis, tuberculosis or AIDS, may be considered handicapped. An employer may not discriminate against a qualified handicapped individual simply because of fears of contracting a particular illness or because of customers' and/or coworkers' bias against individuals with a particular disease. An employer may have a defense if employing an individual with an illness poses a reasonable probability of substantial harm to the individual or to others.

B. Qualified Handicapped Person/Essential Functions

A "qualified handicapped person" is a handicapped person who can perform the essential functions of a job with or without reasonable accommodation. The law protects qualified handicapped persons. The law does not require an employer to hire, promote or retain a handicapped person who cannot perform the essential functions of the job. The "essential functions" of the job are those functions which must necessarily be performed by an employee in order to accomplish the principal objectives of the job. Put another way, the "essential functions" are those that are not incidental or tangential to the job in question. Several considerations bear on whether particular job functions are or are not essential.

First, functions that are identified as part of a job but which are in fact rarely or never performed will not likely be considered essential. Second, in determining whether a job function is essential, the Commission will ask whether removing a given function from the job would fundamentally change the nature of the job in question. Thus, for example, while a firefighter may only be called upon to withstand the intense heat of flames on very rare occasions, removing this function from his/her job would fundamentally change the nature of the job. Other considerations may also be taken into account in determining whether or not certain functions are essential to the job. Consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a timely written job description, this description shall be considered evidence of the essential functions of the job, but will not be binding.

Additional considerations bearing on whether a function is essential include the amount of time spent on the job performing the function, the terms of a collective bargaining agreement, the work experience of past incumbents in the job, and the current work experience of incumbents in similar jobs.

C. Reasonable Accommodation

A "reasonable accommodation" is any adjustment or modification to a job (or the way a job is done), employment practice, or work environment that makes it possible for a handicapped individual to perform the essential functions of the position involved[4] and to enjoy equal terms, conditions and benefits of employment.

The duty to provide reasonable accommodation applies to all aspects of employment, and is intended to reduce work-related barriers that are related to an individual's handicap. Reasonable accommodations apply to workplace modifications that specifically assist an individual in performing the duties of a particular job, and do not ordinarily apply to accommodations that an individual may request for use outside of the work context.

In determining the type of reasonable accommodation required for an applicant or employee, the employer need not provide the best accommodation available, or the accommodation specifically requested by the individual with the handicap. Rather, the employer must provide an accommodation (at its own expense) that is effective for its purpose. Types of accommodation that may, depending upon the circumstances, be considered reasonable include, but are not limited to, the following:

1. making job facilities accessible to and equally usable by a handicapped person;

2. modifying work schedules;

3. modifying when and how an essential job function is performed;

4. obtaining or modifying adaptive job equipment or devices;

5. reassigning nonessential job functions;

6. modifying methods of supervision or evaluation;

7. modifying of tests, examinations, selection devices and/or the manner in which the same are administered;

8. permitting performance of job functions at alternative locations;

9. allowing time off for medical reasons; and

10. reassignment or transfer to a vacant position.[5]

An employer is obligated to provide reasonable accommodation only to the known handicaps of an applicant or employee. An employer need not offer or provide reasonable accommodation where it has no knowledge or reason to know of the individual's need for an accommodation. Unless a handicap and the need for accommodation is known to the employer, it is the responsibility of the individual to inform the employer that an accommodation is needed. If a person with a handicap requests but cannot suggest an appropriate accommodation, the employer and the individual should work together to identify one. The employer may direct the employee to provide reasonable documentation from a health care provider of the existence of a handicap and the need for reasonable accommodation.

D. Undue Hardship

The law provides that an employer is obligated to provide reasonable accommodation to an individual's handicap, unless the employer can demonstrate that the accommodation required would pose an "undue hardship" to its business. Mass. Gen. L. ch. 151B, section 4(16). Factors to be considered in determining whether a particular accommodation poses an undue hardship include:

1. The overall size of the employer's business with respect to the number of employees, number and type of facilities, and size of budget or available assets;

2. The type of the employer's operation, including the composition and structure of the employer's workforce; and

3. The nature and costs of the accommodation needed.

III. Discrimination in Employment Criteria

A. Functional Relation

To comply with the Fair Employment Practices Law, Mass. Gen. L. ch. 151B, employment criteria must be designed to measure only those abilities necessary to perform the essential functions of a job. An employer should examine its employment criteria to determine whether they actually measure abilities which are essential to the performance of the particular job for which applicants are being screened. Criteria which are not essential should be dropped.

B. Job Descriptions

Job descriptions should include only those functions that the employee may reasonably be expected to perform during his/her employment. The job description may indicate whether particular physical or mental abilities are required, such as lifting or carrying heavy objects. Employers should periodically review job descriptions, as the nature of the job may change over time.

C. Uniformity

An employer must apply the same set of criteria to all applicants for a particular position.

D. Test Selection and Adaptation

Like other employment criteria, tests must measure only those abilities which are necessary to perform essential job functions. An employer should determine whether the tests it uses actually predict an individual's ability to perform the essential functions of the job and modify or discard those tests which test nonessential abilities. If the tests used screen out or tend to screen out persons with handicaps, the employer must prove that the tests are job-related and consistent with business necessity. An employer should consider that manual or speech impairments may affect the individual's performance on a particular type of test. For example, a person with a speech impediment may be qualified to perform the essential functions of a job which does not require clear speech. An oral test would not accurately predict the applicant's ability to perform the job.

Employers must make reasonable accommodations when necessary to ensure that tests actually measure the abilities they are intended to measure. Such reasonable accommodations may include but are not limited to the following:

1. providing of extra time;

2. providing of a reader or interpreter;

3. providing a tape recorded test; and

4. allowing test answers to be recorded in alternative ways

IV. Pre-employment Inquiries

A. In General

Employers may not ask applicants about handicaps or disabilities until after the applicant has been given a conditional job offer. The purpose of this restriction is to isolate consideration of an applicant's job qualifications from any consideration of his/her medical or disability-related condition. Employers may tell applicants what is involved in the hiring process and ask whether they will need a reasonable accommodation to take any tests, fill out application forms, or do anything else typically required of applicants.

B. Prohibited Inquiries

A disability-related question is any question that is likely to elicit information about a handicap or disability of the job applicant. Employers may not ask disability questions during the preemployment process, whether on a job application form, in a job interview, or in the employer's background or reference checks. An employer may not ask third parties, such as former supervisors or references, anything which it is not permitted to ask the applicant.

It is illegal for an employer to ask an applicant whether s/he has a disability or needs a reasonable accommodation to perform the job. In addition, questions about any of the following subjects are off limits during the preemployment part of the hiring process because they are likely to elicit information related to a handicap or disability:

1. treatment for medical conditions or diseases;

2. hospitalizations;

3. treatment by a psychologist or a psychiatrist for a mental condition;

4. major illnesses;

5. absences from work due to illness; and

6. physical conditions.

In addition, questions about whether or not someone is impaired in a major life activity are likely to elicit information about a disability.[6] Therefore, such questions are prohibited unless they are specifically targeted to specific job functions and fall within the parameters described in Section C below.

Questions about an applicant's workers' compensation or health insurance history are also prohibited because they are often related to an individual's impairment and are likely to elicit information about a disability. It is discriminatory for an employer to reject an applicant because of a fear that he/she may increase workers' compensation or health insurance costs.

C. Permissible Inquiries

An employer may always ask a job applicant about his/her ability to perform specific job functions. For example, asking "Can you perform any or all of these job functions?" is permissible. An employer can also ask about the applicant's non-medical qualifications and skills, such as education, work history or required licenses. In general, all preemployment questions should focus on an applicant's ability to do the job, not on a disability or handicap.

An employer can also ask applicants to describe or demonstrate how they would perform specific tasks, with or without an accommodation, provided that all applicants in the same job category are asked to do this. For example, if the job requires heavy lifting, the employer can ask all applicants to demonstrate or describe how they would lift the weight. If the applicant needs a reasonable accommodation to do the demonstration, the employer can either provide the accommodation or ask the applicant to describe how s/he would perform the task.

It is permissible for employers to ask whether an applicant can meet the attendance requirements for the job and to inquire about the applicant's attendance record at a former job. However, an employer cannot ask how often an applicant was absent from a former job due to illness, as that question is likely to elicit disability-related information.

D. Questions About Drug Use

Questions about the use of legal and illegal drugs are complicated. With regard to the current use of legal drugs, such questions are likely to elicit information about a disability and are prohibited. For example, asking an applicant to list all currently prescribed drugs may reveal that s/he is using AZT or insulin, indicating that the applicant may be disabled. An exception would exist if the employer has administered a test for the current use of illegal drugs and an applicant tests positive. In that case, the employer may ask about the use of legal drugs in order to seek an explanation for the positive test result.

An employer may inquire about the current illegal use of drugs, provided that the questions are not likely to elicit information about past drug addiction which is a covered disability. For example, it is permissible to ask whether the applicant has ever engaged in the use of illegal drugs and when was the last time. However, it is prohibited to ask if

the applicant has ever been addicted to illegal drugs or treated for drug abuse. Additional and broader questions may be permitted depending on the circumstances and occupation.

E. Questions an Employer May Ask

- Can you perform any or all of these specific job functions?
- Please describe or demonstrate how you would perform a specific task. (This request should be asked of all applicants unless there is an obvious handicap or disability related to a job function. The employer may need to provide reasonable accommodation for the demonstration.)
- Can you meet the attendance requirements?
- What was your attendance record at your prior place of employment?
- Do you currently engage in the illegal use of drugs?
- An employer may invite applicants to voluntarily disclose their handicap or disability for purposes of assisting the employer in its affirmative action efforts. An employer should make it clear that the information will be used solely in connection with its affirmative action efforts, will be kept confidential, and that nondisclosure will not subject the applicant to adverse treatment.

F. Questions an Employer May Not Ask

- Do you have a handicap/disability?
- Do you have any job-related handicaps/ limitations that would prevent you from doing the job?
- Have you ever received Workers' Compensation?
- Have you ever been hospitalized/treated for medical or mental conditions?
- Have you ever been addicted to illegal drugs or treated for drug abuse/alcoholism?
- Have you ever been absent from work due to illness?
- Do you have AIDS?

An employer may not inquire as to the nature, severity, treatment or prognosis of an obvious handicap or disability or of a hidden disability or handicap voluntarily disclosed by the applicant.

V. Medical Examination and/or Inquiries

A. General

An employer must make a conditional job offer before requiring a medical examination (and/or making inquiries). A conditional job offer is an offer of employment to a job applicant which is contingent upon the satisfactory results of a medical examination (and/or inquiry). Prior to making a conditional job offer, the employer should have evaluated all relevant non-medical information. Once a conditional job offer is made, the employer may conduct a medical examination (and/or inquiry) and may condition a job offer on the satisfactory result of a post-offer medical examination (and/or inquiry).

A medical examination is a procedure or test that seeks information about an individual's physical or mental impairments or health.[7] The following questions are helpful in determining whether a procedure or test is "medical":

1. Is it administered by a health care professional or someone trained by a health care professional?
2. Are the results interpreted by a health care professional or someone trained by a health care professional?
3. Is it designed to reveal an impairment or physical or mental health.
4. Is the employer trying to determine the prospective employee's physical or mental health or impairment?
5. Is it invasive?
6. Does it measure a prospective employee's performance of a task (hence, not a medical exam) or does it measure the applicant's physiological responses to performing the task (like blood pressure or heart rate - hence a medical exam)?
7. Is it normally given in a medical setting?
8. Is medical equipment used?[8]

B. Post-Offer Medical Examinations

Under Mass. Gen. L. ch. 151B, an employer may require a medical examination (and/or inquiry) after making a job offer and may condition an offer of employment to a job applicant on the results of such examination (and/or inquiry). Such an examination should be conducted solely for the purpose of determining whether the employee, with reasonable accommodation, is capable of performing the essential functions of the job. An employer may only conduct

such an examination (and/or inquiry) if all entering employees in the same job category are subjected to such an examination (and/or inquiry), not merely those with known disabilities or those whom the employer believes may have a disability.[9]

Under Mass. Gen. L. ch. 151B, if an individual is not hired because a post-offer medical examination (and/or inquiry) reveals a disability, the exclusionary criteria used must be job-related, consistent with business necessity[10] and necessary for the performance of the essential functions of the job sought. [11]A post-offer medical examination (and/or inquiry) may, for example, disqualify an applicant who would pose a "direct threat" to health or safety. [12] However, an employer may not disqualify a handicapped individual who is currently able to perform the essential functions of the job sought, with or without reasonable accommodations, because of a speculation that the handicap may cause a risk of injury in the future. [13]A medical examination (and/or inquiry) may also disqualify an applicant who is unable to perform the essential functions of the job sought, with or without reasonable accommodations. [14] The employer must further show that no reasonable accommodation was available that would enable this individual to perform the essential job functions, or that accommodation would impose an undue hardship.

C. The Doctor's Role

A doctor or health care provider who conducts a medical examination (and/or inquiry) for an employer should not be responsible for making employment decisions or deciding whether or not a reasonable accommodation can or should be made.[15] The employer is responsible for such decisions. The doctor or other health care provider's role in this process is an advisory one, limited to advising the employer about the job applicant's functional abilities and limitations in relation to specific job functions, and about whether or not the job applicant meets the employer's health and safety requirements. [16]

Employers should provide such doctors or other health care providers with specific information about the physical and mental requirements for the job and about the employer's health and safety requirements.[17] Employers should further inform such doctors or health care providers that any recommendations or conclusions made by such doctors or health care providers relating to the job applicant should focus on the following two issues: (1) whether the applicant is able to perform the job, with or without reasonable accommodation; and (2) whether the applicant can perform the job without posing a direct threat to the health or safety of the applicant or others.[18]

D. Tests Or Examinations Permitted Before Extending A Job Offer To A Prospective Employee

Under Mass. Gen. L. ch. 151B, prospective employees can always be asked to complete "tests" that are non-medical in nature and measure whether the applicant can perform actual job functions. For example, prospective police officers may be asked to participate in a physical agility test, like running an obstacle course. Because this test measures the applicant's ability to perform the job and is not a medical examination, it is permitted at the pre-offer state. An employer can ask prospective employees to have a health care professional state whether they can safely perform agility or other permissible tests before commencing the tests.

E. Confidentiality

Mass. Gen. L. ch. 151B does not contain any specific language requiring confidentiality of information obtained by an employer from medical examinations (and/or inquiries). Under Federal law, however, such information must be kept apart from an employee's personnel files as a separate, confidential medical record, even information which the prospective employee voluntarily tells the employer. In order to comply with Federal law, such confidential information should only be disclosed to supervisors, managers, first aid and safety personnel, state officials and insurance companies in accordance with the provisions set forth in Section VI(D) below. Further, such confidential information should remain confidential even if the prospective employee isn't hired. If a hiring occurs, such confidential information should remain confidential even after the individual is no longer an employee.

F. Post-Hire Medical Examinations and Inquiries

Mass. Gen. L. ch. 151B does not contain any specific language distinguishing post-offer medical examinations (and/or inquiries) from post-hire medical examinations (and/or inquiries). Under Federal law, however, clear distinctions exist between what can be required by an employer in a post-offer, pre-employment situation (as discussed above) and medical examinations required by employers when the employee in question is a current employee or is an employee coming back to work after a leave of absence.[19] In order to comply with Federal law, post-hire medical examinations (and/or inquiries) must be job related and consistent with business necessity. [20]For example, employers may conduct medical examinations (and/or make inquiries) concerning the ability of the employee to perform job-related functions, or where there is evidence of a job performance or safety problem.[21] Employers may also conduct such examinations (and/or make inquiries) as required by Federal law, [22] and may conduct voluntary examinations (and/or make inquiries) that are part of an employee health program. [23]

VI. Post-hire Inquiries

A. Federal and State Law

The Americans with Disabilities Act (ADA) expressly prohibits a covered employer from making inquiries of an employee as to whether such employee is an individual with a disability, or as to the nature and severity of the disability, unless the inquiry is shown to be job-related and consistent with business necessity.[24] The Massachusetts statute and regulations, by contrast, do not expressly prohibit post-hire inquires. Such inquiries, however, may be

evidence of discrimination. The EEOC interprets the ADA's requirements concerning inquiries and medical examinations of employees as being more stringent that those affecting applicants.[25]

B. Circumstances Justifying Inquiry (State or Federal)

1. Job-Related Inquiries Consistent With Business Necessity
   An employer may inquire of an employee as to whether s/he has a handicap or disability, and may ask the employee about the nature and extent of the handicap or disability, if the inquiry is job-related and consistent with business necessity. An employer may also make inquiries into the ability of an employee to perform any job-related functions. In all instances, the purpose of the inquiry must be one of business necessity, and the scope of the inquiry must be limited to job-related functions.[26] Examples of circumstances justifying such inquiry by the employer may include, but are not limited to, the following:

   a. the employer becomes aware of evidence of a direct threat to health or safety that it reasonably believes may be caused by an employee's handicap or disability;

   b. the employer becomes aware of evidence of problems related to job performance (e.g., falling asleep on the job, excessive absenteeism, performance problems); or

   c. an employee wishes to return to work after an injury or illness and the employer wants to determine the employee's ability to perform the essential functions of the job without risk of harm to the employee or others. [27]

2. Inquiry Necessary for Reasonable Accommodation
   Medical information may be needed to determine whether the employee has a handicap or disability and is entitled to an accommodation, and if so, to help identify an effective accommodation. An employer is entitled to conduct appropriately focused inquiries in this context.

   Medical inquiries related to an employee's handicap or disability and functional limitations may include consultations with knowledgeable professional sources, such as occupational and physical therapists, rehabilitation specialists, and organizations with expertise in adaptations for specific handicaps or disabilities. [28]

3. Inquiries Required By Law
   Employers may make inquiries in connection with periodic examinations and other medical screening and monitoring required by federal, state or local laws, as long as the inquiry is job-related and consistent with business necessity. If the federal, state or local law does not impose this standard for inquiry, the inquiry may not be permissible.

   Examples of permissible inquiries include those made in connection with medical examinations and monitoring required by:

   a. the US Department of Transportation for interstate bus and truck drivers, railroad engineers, airline pilots and air controllers;

   b. the Occupational Safety and Health Act;

   c. the Federal Mine Health and Safety Act;

   d. other statutes that require employees exposed to toxic or hazardous substances to be medically monitored at specific intervals. [29]

4. Voluntary Wellness and Health Screening Programs
   As part of an employee health program offered by the Employer, an employer may conduct voluntary inquiries, just as it may conduct voluntary medical examinations.[30] Examples of such programs include medical screening for high blood pressure, weight control and cancer detection.[31]

C. Information May Not Be Used to Discriminate

An employer may not use disability-related information to discriminate against the employee in any employment practice, including but not limited to hiring, compensation, insurance and other benefits, assignment, training, evaluation, advancement opportunity, promotion, discipline and discharge.

An employer may not do anything indirectly through contractual relationships (including labor union contracts) or other means which it cannot do directly.

D. Confidentiality

Under Federal law, any written information that employers obtain in the course of permissible inquiries shall be collected and maintained on separate forms and in separate medical files (not the employee's personnel file) and is to be treated as a confidential medical record. [32] All medical-related information must be kept confidential with the following exceptions:

1. supervisors and managers may be informed about necessary restrictions on the work or duties of an employee and necessary accommodations;

2. first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment or if any specific procedures are needed in case of fire or other evacuations;

3. government officials investigating compliance with the ADA and other federal and state laws prohibiting discrimination on the basis of disability or andicap should be provided relevant information on request;

4. Relevant information may be provided to state workers' compensation offices or "second injury" funds, in accordance with state workers' compensation laws; or

5. Relevant information may be provided to insurance companies where the company requires a medical examination to provide health or life insurance for employees.[33]

Chapter 151B does not specifically require confidentiality; however, failure to maintain the confidentiality of medical information may be evidence of discriminatory motive or otherwise unlawful.

VII. Provisions of Reasonable Accommodation

[34]An employer may not refuse to provide a qualified handicapped person with reasonable accommodation unless the employer can demonstrate that the accommodation required to be made would impose an undue hardship to the employer's business.

The Commission encourages an open and ongoing dialogue between employees and employers about the provision of reasonable accommodation. The goal is to accommodate the needs of qualified handicapped individuals, while satisfying the legitimate business interests of employers. For example, in the case of an employee who needs weekly medical treatment, the employer and employee could discuss the convenient scheduling of such treatment, or could work together to arrange for treatment during times other than regular business hours.

A. Notice and Duty

An employer should notify all applicants and employees of its obligation to provide reasonable accommodation. Further, an employer should notify employees that an applicant/employee may request a reasonable accommodation if s/he is handicapped and requires an accommodation.

The employer's duty to provide reasonable accommodation is triggered if an employee identifies him/herself as a qualified handicapped person and requests reasonable accommodation. Where an employee has not requested reasonable accommodation, an employer's duty to offer reasonable accommodation may still be triggered if the employer knows or should know that the employee is handicapped and requires reasonable accommodation. An employer should know that an employee is handicapped and requires reasonable accommodation if a reasonable person in the employer's position would know the employee was handicapped and required reasonable accommodation. If an employee with a disability about which the employee knows or should know is having difficulty performing his or her job, an employer may inquire whether the employee is in need of a reasonable accommodation. In general , however, it is the responsibility of the individual with a disability to inform the employer that an accommodation is needed. When the need for an accommodation is not obvious, an employer, before providing a reasonable accommodation, may require that the individual with a disability provide documentation of the need for accommodation.

B. Required Accommodation

Generally, reasonable accommodation for an applicant is a modification or adjustment to the application process that enables a qualified handicapped applicant to be considered for the desired position. Generally, reasonable accommodation for a current employee is a modification or adjustment to the work environment, enabling a qualified handicapped person to perform the essential functions of that position, or enabling handicapped employees to enjoy the same privileges and benefits of employment as are enjoyed by non-handicapped employees.

C. Undue Hardship

An employer must provide reasonable accommodation unless it can demonstrate that the accommodation required would impose an undue hardship to the employer's business. Whether accommodation imposes an undue hardship on a business requires a particularized analysis and balancing of the handicap, the accommodation at issue, and the nature of the employer's business. In determining whether accommodation would pose an undue hardship to the employer's business, the following factors may be considered:

1. the overall size of the employer's business with respect to the number of employees, number and type of facilities, and size of budget or available assets;

2. the type of the employer's operation, including the composition and structure of the employer's workforce; and

3. the nature and costs of the accommodation needed.

If a handicapped employee/applicant proves that s/he is capable of performing the essential functions of a job with reasonable accommodation, the employer bears the burden of proving that the accommodation at issue would create an undue hardship. If a particular accommodation would pose an undue hardship, the employer should try to identify another accommodation that would not pose such a hardship.

Once an employer is on notice that a qualified handicapped employee requires accommodation to perform the essential functions of his/her job, the employer should initiate an informal interactive process with the qualified individual in need of accommodation. This process should identify the precise limitation resulting from the handicap and potential reasonable accommodations that could overcome those limitations.

VIII. Affirmative Action Programs

An employer may make an inquiry concerning an applicant's handicap when s/he "invites applicants to voluntarily disclose their handicap for purposes of assisting the employer in its affirmative action efforts."[35]

In any questionnaire used for this purpose, an employer must state clearly the following:

1. the information is intended for use in its affirmative action efforts only;
2. the information is being requested on a voluntary basis;
3. refusal to provide this information will not subject the applicant to any adverse treatment;
4. the information will be kept confidential; and
5. the information will be kept separate from the applicant's personnel records, if hired.

Information obtained in inquiries made as part of an affirmative action program may be revealed to government officials investigating compliance with the law.

IX. Proving Handicap Discrimination

A. Burdens of Proof

The Complainant is responsible for proving by a preponderance of the evidence that the Respondent violated a provision of the handicap discrimination law. Proof by a preponderance is defined as establishing as more likely than not the existence or nonexistence of a fact.

There are two common scenarios that arise in handicap claims: (1) where the motive for the adverse employment action is not disputed, and (2) where the motive is disputed. Frameworks for addressing these two types of claims are discussed below. In addition, a third framework is utilized when an issue arises regarding whether or not an employer should have provided a reasonable accommodation.

The framework set forth below in Section IX(A)(1) applies when the motive for an adverse employment action is not at issue, and the parties agree as to why the action occurred. For example, a physical therapist working in the rehabilitation unit of a hospital injured his back, and was unable to perform repeated stooping or heavy lifting. The hospital terminated the physical therapist because it believed he could no longer perform the essential functions of his job, which included assisting and transferring patients. In this case, both the therapist and the hospital agree that the back injury motivated the termination decision, and the analysis focuses upon whether such consideration of the back injury was appropriate and justified under the circumstances. Specifically, the analysis will highlight whether repeated stooping or heavy lifting are essential functions of the job, and whether the hospital could have provided a reasonable accommodation that would have permitted the therapist to perform these functions in light of his handicap or disability.

In contrast, the framework set forth below in Section IX(A)(2) applies when the motive for an adverse employment action is at issue, and the parties do not agree why the action occurred. For example, an engineer was terminated during a reduction in force for the stated reason that she had poorer performance evaluations than her peers. The engineer disagrees that she was terminated for performance reasons, alleging that the real reason was her mental handicap, clinical depression.

Finally, the framework described below in Section IX(A)(3) applies when an employee claims that an employer failed to provide reasonable accommodation. For example, a social worker may bring a claim alleging that an employer refused to provide her with a reasonable accommodation, specifically an extended leave of absence, when s/he was suffering from chronic fatigue syndrome.

A common type of handicap discrimination case involves the allegation that an employer terminated an employee because of her handicap. In such cases, the Complainant must prove that s/he was a qualified handicapped individual who was terminated because of her handicap. The following discussion of the burdens of proof will assume allegations of discriminatory termination. However the same burdens of proof may be utilized, with minor adjustments, to address other adverse employment actions, such as demotion, failure to promote, or failure to hire.

1. Analysis when the motive for an adverse employment action is not at issue.
   In cases where the employee has been terminated expressly because of the handicap, and the employer's reason for terminating the employee is not in dispute, a burden shifting framework is used to determine whether there has been a violation.[36] First, the Complainant must prove her prima facie case, i.e., that s/he was a qualified handicapped person who was terminated because of her handicap. [37]

   If Complainant establishes her prima facie case, the Respondent is given the burden of producing credible evidence that the Complainant was not a qualified handicapped person or that her rejection was for reasons other than her handicap.[38] If the Respondent presents evidence that Complainant was not a qualified handicapped person, then Complainant's final burden is to rebut Respondent's evidence. The Complainant must prove that the

Respondent's reasons for termination are based upon misconceptions or unfounded factual conclusions, and that the reasons articulated for the termination encompass unjustified consideration of the handicap.[39] If the Complainant succeeds in this burden, s/he will have demonstrated a violation of the handicap discrimination law, subject to a number of possible defenses to be described in Section IX(B) below.

2. Analysis where motive is at issue, and the parties disagree over the real reason for the adverse employment decision
   In cases in which there is material dispute as to the reasons why the employee was terminated, the Complainant may satisfy her burden of proof by providing direct evidence of a discriminatory termination. One example of direct evidence might include a comment from a supervisor to the effect that handicap was the motivating factor in the decision to terminate the Complainant.

In the absence of direct evidence, the Complainant may utilize circumstantial evidence, pursuant to a second burden-shifting framework. [40]This framework, patterned on the case of McDonnell Douglas Corp. v. Green, 93 S. Ct. 1817 (1973), provides an inferential method of proving that the Complainant would not have been terminated but for the handicap.

Under the McDonnell Douglas analysis, the Complainant must first establish a prima facie case. The prima facie case may vary, depending on the circumstances involved. One example of a prima facie case is as follows:

> plaintiff must present credible evidence that (1) he is handicapped within the meaning of the statute; (2) he is qualified to perform the essential functions of the job with or without reasonable accommodation; (3) he was terminated or otherwise subject to an adverse action by his employer; and (4) the position he had occupied remained open and the employer sought to fill it.[41]

If the Complainant establishes her prima facie case, the burden shifts to the Respondent to articulate a legitimate, non-discriminatory reason for the termination, by providing credible evidence that the reason advanced is the real reason.[42]If the Respondent meets this burden of articulation and production, then the burden shifts back to the Complainant to demonstrate that the articulated reason was not the real reason for discharge.[43]

While the McDonnell Douglas framework will lead to a finding of discrimination if Complainant prevails (subject to various affirmative defenses described in Section IX(B) below), it should not be considered an exclusive mechanism for proving discrimination. Complainant should proffer the full range of direct and circumstantial evidence of discrimination available to her, in conjunction with the specific burdens set forth in the McDonnell Douglas framework.

For example, the Complainant could provide evidence of workplace harassment based on handicap, comments indicating that the handicap was perceived by the employer as an unwarranted expense or as a negative attribute, a record on the part of the employer of treating handicapped individuals worse than similarly situated non-handicapped individuals, or a practice on the part of the employer of asking illegal pre-employment inquiries relating to handicap. Likewise, the Respondent is free to present other evidence reflecting the absence of discrimination, including, for example, its practice of treating handicapped individuals fairly, its good record of hiring obviously handicapped individuals, and its good record of accommodating handicapped employees.

Complainant may succeed even if her termination was motivated only in part by unlawful consideration of handicap. Complainant need not prove that consideration of handicap was the sole reason for the discharge, but may recover where a combination of lawful and unlawful reasons motivated the discharge.

3. Failure to Provide Reasonable Accommodation
   If an employee alleges that the employer failed to reasonably accommodate the employee's handicap, the following burdens apply. The Complainant must prove that (1) s/he was a qualified handicapped individual; (2) s/he needed a reasonable accommodation due to her handicap to perform her job; (3) the employer was aware of the handicap, and was aware that the employee needed reasonable accommodation to perform her job; (4) the employer was aware of a means to reasonably accommodate the handicap, or the employer breached a duty, if any, to undertake reasonable investigation of a means to reasonably accommodate the handicap; and (5) the employer failed to provide the employee the reasonable accommodation.[44]

If the Complainant prevails on these elements, the burden then falls upon the Respondent to prove that the reasonable accommodation would pose an undue hardship. Complainant may then rebut the Respondent's evidence that the reasonable accommodation would be an undue hardship.

B. Defenses to Handicap Discrimination Claims

There are a number of defenses to handicap discrimination claims, and in all cases, the employer is responsible for proving by a preponderance of the evidence facts that would support the defense.

1. Undue Hardship
   An employer is not required to provide a reasonable accommodation that would impose an undue hardship on the employer's business. Whether a particular accommodation would pose an undue hardship should be determined on a case-by-case basis. [45]

2. Physical or Mental Job Qualification Requirement
   A complainant must always prove that s/he is a qualified handicapped individual, capable of performing the essential functions of a job with or without reasonable accommodation. However, where an employer rejects an employee based upon specific physical or mental job qualification requirements (e.g., the ability to lift over forty

pounds), the burden is on the employer to prove that the requirement is functionally related to the specific job or jobs for which the individual is being considered, and is consistent with the safe and lawful performance of the job. [46]

3. Direct Threat to Health or Safety
   An employer may defend a decision to terminate or not hire a handicapped individual because there is a risk of future injury to the employee or others. In order to establish this defense, an employer must prove that there is a "reasonable probability of substantial harm" to the employee or others. [47]

Whether there is a risk of future injury should be determined on a case-by-case basis. To meet its burden, an employer must make an individualized factual inquiry, gather substantial information regarding the employee's individual work and medical history, and may not make a determination based upon a subjective evaluation or speculation as to risk, or except in cases of a very apparent nature, merely on medical reports. An increased risk of injury, without more, is insufficient to establish this defense.[48]

X. Special Topics

A. AIDS/HIV

An employer may not discriminate against persons with Acquired Immune Deficiency Syndrome (AIDS), who are HIV positive, or who are perceived to have or be at risk of having AIDS. Such persons are entitled to all of the protections and practices which apply to handicapped employees described previously in these Guidelines.

An employer may not refuse to hire, to promote or otherwise discriminate against a qualified person who has AIDS/HIV, is perceived to have AIDS/HIV or is perceived to be at risk of having AIDS/HIV. Nor may an employer make pre-employment inquiry as to whether an applicant has AIDS/HIV or is at risk of having AIDS/HIV. An employer may not refuse to provide reasonable accommodation to qualified employees or applicants who have AIDS/HIV.

B. Absenteeism/Leaves of Absence for Handicapped Persons

A reasonable accommodation under Mass. Gen. L. ch. 151B, section 4(16) may include granting a leave of absence or permitting a modified work schedule. It may also include permitting the use of accrued paid leave or providing additional unpaid leave.[49]

A leave of absence is not a reasonable accommodation if it poses an undue hardship on the employer. In addition, frequent or prolonged absences may mean that the employee is not a "qualified individual" as defined in Mass. Gen. L. ch. 151B, section 1(16). Although an employer has a duty to provide reasonable accommodation, an employer is not required to disregard or waive an employee's inability to perform an essential function of the job in question.[50] It may be impossible to perform the essential functions of many jobs without regular attendance.[51] For example, a teacher who is required to give classroom instruction and spend time with students may not be a "qualified individual" if frequent absence prevents effective functioning in those capacities, regardless of his/her performance while actually at work.[52]

The possibility of working at home or elsewhere should be considered in evaluating whether an employer can reasonably accommodate an individual's need to be away from the workplace. If a qualified individual can perform the essential functions of his/her position from an off-site location without posing an undue hardship on the employer, such accommodation may be reasonable. Such a determination depends on the nature of the job, the individual and the handicap. For example, an employee with chronic back and neck pain who could not endure long daily commutes to work may be able to work from home using a computer modem, fax, and other technologies.[53] However, off-site work may not be a reasonable accommodation where, for example, the position requires personal contact and coordination with coworkers or clients.[54] Also, depending on the nature of the position, it may not be reasonable to permit an employee to work without supervision.[55]

C. Substance Abuse

1. Handicapped Person - Unlawful Drug Use
   Current illegal drug use does not fall within the definition of handicap under Mass. Gen. L. ch. 151B, section 1(17). The term handicap does, however, apply to individuals having an addiction to drugs who are not currently using illegal drugs, having a record of an addiction to drugs, or who are regarded as having an addiction to drugs. Unjustified concern regarding a potential relapse into drug use may indicate that the employer regards the employee as addicted (handicapped).

   While addiction may be protected, occasional, casual drug use is not protected. The term handicap does not apply to individuals using drugs recreationally, regarded as using drugs recreationally, or with a record of such drug use.

2. Handicapped Person - Alcoholism
   Alcoholism is a handicap. Likewise, individuals regarded as alcoholics, and those with a record of alcoholism, may be considered handicapped. Occasional, casual alcohol consumption, however, is not a handicap.

3. Qualified Handicapped Person/Essential Functions
   As discussed above in section II(B), a "qualified handicapped person" is a handicapped individual who, in spite of his/her handicap, can perform the essential functions of the job in question with or without reasonable accommodation. This definition applies to individuals who are handicapped as a result of their addiction to alcohol, individuals with a record of addiction to unlawful drugs or alcohol, and individuals regarded as addicted to unlawful

drugs or alcohol. An employer may hold individuals who are handicapped as a result of their addiction to the same standards of job conduct and performance as other employees, subject to the duty to reasonably accommodate the employee. The employee may be terminated to the extent that the employee cannot perform the essential functions of his/her job, with or without reasonable accommodation.

An addicted individual engaging in misconduct may be subjected to discipline, including termination, if the employer would subject a non-handicapped individual to similar discipline for similar misconduct. This is true even if the misconduct is related to the handicap. On the other hand, an employer may not treat the misconduct of an addicted employee more harshly than it would the misconduct of a non-handicapped individual. Moreover, where misconduct is related to the handicap, the employer may have a duty to provide reasonable accommodation.[56]

4. Promulgation And Enforcement Of Alcohol Related Work Rules
   An employer may establish and enforce drug and alcohol related work rules, including but not limited to (a) prohibiting the bringing of alcohol or unlawful drugs onto, and consumption of alcohol or unlawful drug use at, the workplace; (b) prohibiting employees from being under the influence of alcohol or unlawful drugs at the workplace; and (c) requiring employees to comply with all state and federal drug and alcohol-related laws or regulations to which the employing unit and/or its employees are subject. While violation of drug and alcohol-related work rules may be the basis for disciplining an addicted employee, the duty to reasonably accommodate handicapped employees pertains to these as well as to other work rules.

5. Reasonable Accommodation
   An employer must provide reasonable accommodation to individuals handicapped as a result of their addiction to alcohol where such accommodation permits them to perform the essential functions of the job, unless such accommodation creates an undue hardship.[57] Under Mass. Gen. L. ch. 151B, reasonable accommodation for an individual who is handicapped as a result of addiction to alcohol may include permitting the individual to attend counseling, or providing the individual with leave in order to participate in rehabilitation services or to otherwise control his/her addiction. There is a distinction between an employer's provision of leave to allow an employee to address a handicap, and an employer's relaxation or elimination of its attendance requirements. An employer's granting leave to an employee to attend counseling or other rehabilitative services may be a reasonable accommodation required by Mass. Gen. L. ch. 151B because it may enable the employee to fully perform the essential functions of his/her job. An employer's relaxation or elimination of essential job functions, including attendance requirements, is not a reasonable accommodation required by Mass. Gen. L. ch. 151B because such action does not enable the employee to fully perform the essential functions of his/her job. Addicted employees requiring time off for treatment should be accommodated just as employees with other types of handicaps.[58]

6. Undue Hardship
   An employer need not furnish a reasonable accommodation under Mass. Gen. L. ch. 151B where such accommodation would pose an undue hardship to the employer and/or its operation, considering the particular nature of the employer's business.[59]

7. Drug/Alcohol Tests (and/or Inquires)
   Under certain circumstances, tests (and/or inquires) intended or designed to determine current unlawful drug use may be administered to (or made of) applicants, individuals with conditional offers of employment, and under certain circumstances, employees. An employer's right to administer such tests (or make such inquires) may implicate privacy rights, such as Mass. Gen. L. c. 214, section 1B. In addition, such tests (or inquires) may implicate collective bargaining rights in a unionized workplace.[60] Apart from privacy or collective bargaining issues, under some circumstances an unjustified requirement of submission to drug or alcohol tests or inquiries might be deemed evidence of handicap discrimination.

D. Disability-Related Misconduct

Where misconduct is related to a handicap or disability, there may be a duty to provide reasonable accommodation. Such accommodation may include, for example, a leave of absence or participation in a company employee assistance program. Where the employee's behavior poses a direct threat to himself or others (shown by a reasonable probability of substantial harm), the employee may not be considered a "qualified handicapped person." In determining whether reasonable accommodation is possible, the employer should make an objective evaluation of all available relevant facts about the employee's work history and medical history.

E. Interrelated Laws

Employees with impairments, whether or not they rise to the level of "handicap" as defined by Mass. Gen. L. ch. 151B, may have rights under other state or federal statutes.

1. Worker's Compensation
   A policy statement relating to the interrelationship between the Massachusetts Workers' Compensation Act and Mass. Gen. L. ch. 151B is under development.

2. FMLA/Maternity Leave
   An employee whose health condition requires a leave of absence from work may have rights under the federal Family & Medical Leave Act (FMLA), 26 U.S.C. S 2601 et seq. An employee who requires a leave of absence from work because of a pregnancy-related health condition may also have rights under the state Maternity Leave Act, Mass. Gen. L. ch. 149, section 105D, as well as the Pregnancy Discrimination Act component of Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. S 2000e(k).

The FMLA provides eligible employees up to twelve weeks of unpaid leave a year for certain reasons including their own "serious health condition." A serious health condition is an illness or injury that involves either (1) inpatient care in a hospital, hospice or residential medical care facility, or (2) continuing treatment by a health care provider. [61] Some impairments or handicaps may meet the definition of "serious health condition," whereas others may not. Conversely, some individuals having a "serious health condition" may not have a handicap or disability because their impairment does not affect a major life activity. The FMLA provides coverage for many of the short-term injuries or illnesses that do not rise to the level of a "handicap" as that term is defined in 151B. The FMLA is much more limited in its coverage than Chapter 151B, however, because it covers only employers with fifty or more employees. In addition, to be eligible, an employee must have been employed by the employer for a year; must have worked 1,250 hours in the prior twelve months; and must work at a worksite with fifty or more employees within a seventy-five-mile radius.

An example of how the FMLA and 151B intersect occurs when an employee is injured and requires substantial leave to recover from his injury. If applicable, the employee may be allowed up to twelve weeks of leave under the FMLA. However, if he is still not able to perform the essential functions of his job when his FMLA leave expires, he may have rights to additional leave under 151B as a reasonable accommodation.

Pregnancy-related health conditions may or may not rise to the level of "handicap" under 151B. The FMLA specifically defines a pregnancy-related health condition as a serious health condition. In addition, the Massachusetts Maternity Leave Act provides up to eight weeks of unpaid leave to female employees after the birth or adoption of a child. To obtain this leave, the employee does not have to prove that s/he is disabled from work. An employee who uses her twelve weeks of leave under the FMLA for a pregnancy-related disability remains eligible for an eight-week maternity leave under state law. But this does not mean she is entitled to a twenty-week maternity leave where she has a normal pregnancy with no related disability.

An employee may develop a disability as a result of pregnancy or childbirth, which could affect her return to her job, for which s/he might require a reasonable accommodation. In addition, an employer should treat an employee who cannot work because of a disability related to pregnancy or childbirth the same way it treats other disabled or handicapped employees. Thus, an employer who has a short term disability (STD) policy must allow an employee with a disability related to pregnancy or childbirth to use STD in the same way other employees who develop short term disabilities are entitled to use STD.

3. Americans with Disabilities Act
   The Americans with Disabilities Act (ADA) applies to employers with fifteen or more employees, whereas 151B applies to employers with six or more employees. Both the ADA and 151B cover employees as well as applicants. [62] Under both Acts an employer may not inquire, on a job application or during an interview, about an applicant's disability status, job-related injuries or workers' compensation history.

   The purpose underlying the ADA is to prohibit employers from excluding persons with disabilities from employment opportunities, unless the person is actually unable to perform the essential functions of the job. The ADA prohibits employers, employment agencies and labor organizations from limiting, segregating or classifying disabled applicants or employees, on the basis of disability in a way that adversely affects their employment opportunities or status.

   Consideration must be given under both the ADA and 151B to situations where the requested accommodation creates a conflict with a collective bargaining agreement.[63]

F. Collective Bargaining Agreements

1. In General
   Employers and unions negotiating collective bargaining agreements must be sensitive to the needs of employees with disabilities for reasonable accommodation and should build necessary flexibility into the contract.[64] Negotiating a contract that may require the union or the employer or both to violate anti-discrimination laws may subject both to liability under the laws.

   For example, a collective bargaining agreement that requires that vacant positions be filled internally according to seniority may conflict with the need to reasonably accommodate an employee with less seniority than another applicant who can no longer perform the functions of her former job because of a disability but who could perform the functions of the vacant position.

   Where there is a conflict between the union contract and the duty to accommodate a disabled employee that cannot be resolved through negotiation, the Commission will weigh that conflict on a case-by-case basis in evaluating the reasonableness of the requested accommodation.[65]

2. Preemption
   In some cases, and especially those in which an existing collective bargaining agreement contains specific provisions for accommodating disabled or handicapped employees, such as transfer options, light duty classifications, position restructuring, or other special arrangements, federal labor law may preempt state handicap and disability claims.[66]

   Courts generally have held that state law discrimination claims based on other protected categories (such as race, religion and sex) are not preempted.[67] Handicap claims, however, frequently involve the legal concept of "reasonable accommodation" not found in those other discrimination claims. "Reasonable accommodation" may

include a wide range of actions by an employer (medical leave, reduced hours or otherwise modified work schedules, and job restructuring) any or all of which might be the subject of labor contract agreements.[68] Most courts who have decided the issue, therefore, engage in a case by case analysis of the particular facts involved in the claim in light of the applicable collective bargaining agreement.[69]

In these cases, courts determine whether a particular state law claim is preempted by deciding whether "the resolution of [the]state-law claim depends upon the meaning of the collective bargaining agreement."[70] Thus, for example, the existence of provision in a collective bargaining agreement that generally prohibited discrimination based on handicap or disability would not require preemption. By contrast, a case involving a claim for failure to accommodate, where the labor contract contains comprehensive procedures for placement of light duty employees or for reinstatement after a period of disqualifying disability, and there is no evidence that the employer regularly deviates from such procedures, might be preempted because the discrimination claim is so intertwined with the operation of the labor contract that it cannot be assessed without consideration of the contract.

End Notes

[1]The Massachusetts Commission Against Discrimination ("MCAD" or "the Commission") understands that the words "disabled" and "disability" are the more common and accepted parlance than the words "handicapped" and "handicap." The word "handicap," however, is utilized in the governing statute and regulations. See Mass. Gen. L. ch. 151B (1996); Mass. Regs. Code tit. 804 S 3.00 et. seq. (1995). These governing authorities are quoted throughout these Guidelines. These Guidelines will utilize the words "handicap," "handicapped," "disability" and "disabled."

[2]These guidelines will not answer every question concerning application of the law against employment discrimination on the basis of handicap. This commission exists to enforce Mass. Gen. L. ch. 151B and is not bound by federal law. However, "the Federal guidelines can be used to guide Massachusetts in interpreting G.L. c. 151B." LaBonte v. Hutchins & Wheeler, 424 Mass. 813, 823 n. 13 (1997). Sources of guidance under analogous federal law include: the Americans with Disabilities Act, 42 U.S.C. S 12101 et. Seq. (1995); the Rehabilitation Act of 1973, 29 U.S.C. SS706, 791-794 (1994); US Equal Employment Opportunity Commission Regulations: Equal Employment Opportunity for Individuals With Disabilities, 29 CFR S 1630 (1997); EEOC Interpretive Guidance on Title I (Equal Employment Provisions) of the Americans with Disabilities Act, 29 CFR app. S 1630; US EQUAL EMPLOYMENT OOPPORTUNITY COMMISSION, TECHNICAL ASSISTANCE MANUAL ON ADA TITLE I [hereinafter EEOC TITLE I MANUAL]; EEOC Enforcement Guidance On the Americans with Disabilities Act and Psychiatric Disabilities, EEOC Notice Number 915.002, 3-25-97; EEOC Enforcement Guidance on Workers' Compensation and the ADA, EEOC Notice Number 915.002, 9-3-96; EEOC Enforcement Guidance on Preemployment Inquiries Under the Americans with Disabilities Act, EEOC Notice Number 915.002, 10-18-95.

[3]But see Mass. Gen. L. ch. 152, S 75B (1988) (workers' compensation statute providing individuals who suffer certain on-the-job injuries are handicapped individuals for purposes of ch. 151B).

[4]Mass. Gen. L. ch. 151B, S 4(16). Failure to reassign an individual to a vacant position for which s/he is qualified may be evidence of discriminatory animus.

[5]Reassignment or transfer to a vacant position is usually only a reasonable accommodation where it involves a change in work site or location within the same job category.

[6]See supra Section II(A)(5) (defining a "major life activity").

[7]EEOC Guidance on Preemployment Inquiries Under the Americans with Disabilities Act, 5 Empl. Discrim. Rep. (BNA) 439, 443 (Oct. 18, 1995).

[8]See id. (listing factors).

[9]See 29 C.F.R. S 1630.14(b).

[10]Mass. Gen. L. ch.151B, S 4(16) provides, in pertinent part: "Physical or mental job qualification requirement with respect to hiring . . . shall be functionally related to the specific job or jobs for which the individual is being considered and shall be consistent with the safe and lawful performance of the job." See also 29 C.F.R. S 1630.14(b)(3); EEOC Title I Manual S 6.1.

[11]Id. Mass. Gen. L. ch.151B, S 4(16) states, in pertinent part: An employer may not make preemployment inquiry of an applicant as to whether the applicant is a handicapped individual or as to the nature or severity of the handicap, except that an employer may condition an offer of employment on the results of a medical examination conducted solely for the purpose of determining whether the employee, with reasonable accommodation, is capable of performing the essential functions of the job, and an employer may invite applicants to voluntarily disclose their handicap for purposes of assisting the employer in its affirmative action efforts.

[12]See EEOC Title I Manual S 6.1; see also Mass. Gen. L. ch.151B, S 4(16).

[13]EEOC Title I Manual S 6.1.

[14]See Mass. Gen. L. ch.151B, S 4(16).

[15]See EEOC Title I Manual S 6.4.

[16]Id

[17]Id

[18]Id

[19]For example, an employer may require an employee coming back to work following a leave of absence to submit to a medical examination without first extending a conditional offer of employment.

[20]See 29 C.F.R. S 1630.14(c).

[21]See EEOC Title I Manual S 6.1.

[22]Id.

[23]Id. See infra Section VI.

[24]42 U.S.C. S 12112(d)(4)(A); 29 C.F.R. SS 1630.13, 14.

[25]US Equal Employment Opportunity Commission, Technical Assistance Manual on the Employment Provisions of the ADA S 6.6 (Jan. 1992) [hereinafter EEOC Technical Assistance Manual]. See supra Section V.

[26]29 C.F.R. S 1630.14(c).

[27]29 C.F.R. S 1630.14(c). These examples are discussed in EEOC Technical Assistance Manual S 6.6.

[28]See id.

[29]See id. (discussing these examples).

[30]42 U.S.C. S 12112(d)(4)(B); 29 C.F.R. S 1630.14(d).

[31]See EEOC Technical Assistance Manual S 6.6.

[32]42 U.S.C. S 12112(d)(4)(C); 29 C.F.R. S 1630.14(d).

[33]29 C.F.R. S 1630.14(d); see EEOC Technical Assistance Manual S 6.5.

[34]See supra Section II(C).

[35] Mass. Gen. L. ch. 151B, S 4(16).

[36]Von Dwornick v. Boston Flower Shoppe, Inc., 15 M.D.L.R. 1209, 1225 (1993); McKinley v. Boston Harbor Hotel, 14 M.D.L.R. 1226, 1234 (1992); Ryan v. Town of Lunenberg, 11 M.D.L.R. 1215, 1238 (1989); see also Jasany v. US Postal Service, 755 F.2d 1244, 1250-51 n.5 (6th Cir. 1985).

[37]George v. Skyway Cleaners, 17 M.D.L.R. 1001, 1010 (1995).

[38]If the respondent attempts to meet its burden by showing that termination was for reasons other than handicap, the case should be analyzed by the mixed motive framework, or the McDonnell Douglas framework discussed below. See Dartt v. Browning-Ferris Industries, Inc., 427 Mass. 1, 11 (1998).

[39]Dartt, 427 Mass. at 11-12; Yates v. Mass-C E.O.P.S., 17 M.D.L.R. 1503, 1511 (1995); Ryan, 11 M.D.L.R. At 1239.

[40]Von Dwornick, 15 M.D.L.R. At 1225; McKinley, 14 M.D.L.R. At 1234.

[41]See Dartt, 427 Mass. At 2; Beal v. Board of Selectman of Hingham, 419 Mass. 535, 541 (1995).

[42]See Dartt, 427 Mass. At 11; Blare v. Husky Injection Molding Sys. Boston, Inc., 419 Mass. 437, 441-442 (1995).

[43]See Blare, 419 Mass. At 442-443; Mortimer v. Atlas Distributing Co., Inc., 15 M.D.L.R. 1233, 1252 (1993); Von Dwornick, 15 M.D.L.R. At 1226; DeMears v. City of Chicopee, 13 M.D.L.R. 1365, 1379-80 (1991).

[44]See Wynne v. Tufts Univ. Sch. of Med., 932 F.2d 19, 25 (1st Cir. 1992); S. Churchill, Reasonable Accommodation in the Workplace: A Shared Responsibility, 74 Mass. L. Rev. 73, 75-76, 81 (1995).

[45] Mass. Gen. L. ch. 151B, S 4(16); Yates, 17 M.D.L.R. At 1514. See supra Sections II(D) and VII(C) (discussing factors that should be considered).

[46]Mass. Gen. L. ch. 151B, S 4(16).

[47]Ryan, 11 M.D.L.R. At 1241-42, citing Mantolete v. Bolger, 767 F.2d 1416 (9th Cir. 1985).

[48]Martinez v. Resource Recovery Sys., 16 M.D.L.R. 1589, 1603 (1994).

[49] See 29 C.F.R. app. S 1630.2(O).

[50]Cox v. New England Tel., 414 Mass. 375, 390 (1993).

[51]Leary v. Dalton, 4 A.D. Cases 1163 (1st Cir. 1995); Tydall v. National Educ. Ctrs., 31 F.3d 209 (4th Cir. 1994); Carr v. Reno, 23 F.3d 525 (DC Cir. 1994). See Picot v. New England Tel., Suffolk Sup. CT No 81-969 (J. Flannery 1994).

[52]See Tydall, 31 F.3d at 213.

[53]See, e.g., Sargent v. Litton Sys. Inc., 841 F. Supp. 956 (N.D. Cal. 1994).

[54]See, e.g., Misek-Falkoff v. IBM Corp., 854 F. Supp. 215 (S.D.N.Y. 1994).

[55]See, e.g., Vande Zande v. Wisconsin Dep't of Admin., 851 F. Supp. 353 (W.D. Wis. 1994), aff'd, 44 F.3d 538 (7th Cir. 1995).

[56]See Section X(D).

[57]See Sections II(C) and IV.

[58]See Section VII.

[59]See Sections II(D), VII(C), and IX(B)(1).

[60]See Section IV(D).

[61]29 U.S.C. S 2611(11).

[62]See 29 C.F.R. S 825.114 (defining serious health condition)

[63]See supra Section VI.

[64]See infra Section F.

[65]The EEOC recommends that contracts negotiated after the effective date of the ADA contain a provision permitting the employer to take all actions necessary to comply with the law. EEOC Technical Assistance Manual pt. III-16. For an example of a flexible labor-management policy, see Buckingham v. US, 998 F.2d 735 (9th Cir.1993), in which a memorandum of understanding between the employer and the union allowed valid concerns other than seniority, including EEO factors, to be considered in filling vacancies.

[66]See Emrick v. Libby Owens Ford Co., 875 F. Supp. 393 (E.D. Tex. 1995).

[67]Section 201(a) of the federal Labor Management Relations Act, 29 U.S.C. S 141 et. Seq. (LMRA), establishes federal jurisdiction for "[s]uits for violations of contracts between an employer and a labor organization." Federal law, therefore, preempts any state cause of action for breach of a collective bargaining agreement (CBA), and even suits based on torts rather than on breach of a CBA if the evaluation of the suit is "inextricably intertwined with consideration of the terms of [a] labor contract." Allis-Chalmers Corp. v. Lueck, 471 US 202, 213 (1985). The federal Railway Labor Act, 45 U.S.C. SS 151-188 (RLA), also preempts state law claims.

[68]These decisions follow the 1988 US Supreme Court decision in Lingle v. Norge Div. of Magic Chef, Inc., 486 US 399 (1988). Lingle held that a claim of retaliation for filing a workers' compensation claim was not preempted because the LMRA does not preempt the application of a state law remedy when the "factual inquiry [under the state law] does not turn on the meaning of any provision of a collective bargaining agreement." A recent Supreme Court decision, Hawaiian Airlines, Inc. v. Norris, 512 US 246, 114 S. CT 2239 (1994), has held that the preemption standard in RLA cases is "virtually identical to the preemption standard the Court employs in cases involving S 301 of the [LMRA]." Id. at 2247.

[69]Such provisions in a collective bargaining agreement have a direct impact, not only on the complainant in a disability case, but also on the collectively bargained for terms and conditions of employment of the other bargaining unit employees.

[70]Magerer v. John Sexton & Co., 912 F.2d 525, 528 (1st Cir. 1990) (a post-Lingle case holding that a claim of retaliation for filing workers' compensation claim was preempted by LMRA because the statute deferred to an applicable CBA).

[71]At least one court, however, has ruled that there was no LMRA preemption even when the CBA in question included provisions governing accommodation and reinstatement after a disability. See Smolarek v. Chrysler Corp. 879 F.2d 1326 (6th Cir. 1989) (en banc), cert. denied, 493 US 992 (1989).

171 Wash.2d 736
Supreme Court of Washington,
En Banc.

Jane ROE, Petitioner,
v.
TELETECH CUSTOMER CARE MANAGEMENT (COLORADO) LLC, Respondent.

No. 83768–6.
|
Argued Jan. 18, 2011.
|
Decided June 9, 2011.

Synopsis
Background: After employer rescinded a conditional offer of employment because prospective employee had failed a drug test, prospective employee filed a wrongful termination complaint against employer. Employer removed action. The United States District Court for the Western District of Washington, Ronald B. Leighton, J., 2007 WL 1655172, granted prospective employee's motion to remand. On remand, the Superior Court, Kitsap County, Sally F. Olsen, J., granted employer summary judgment. Prospective employee appealed, and the Court of Appeals, 152 Wash.App. 388, 216 P.3d 1055, affirmed. Prospective employee petitioned for review.

[Holding:] Upon granting review, the Supreme Court, Wiggins, J., held that Washington State Medical Use of Marijuana Act did not regulate the conduct of a private employer or protect an employee from being discharged because of authorized medical marijuana use.

Affirmed.

Chambers, J., filed a dissenting opinion.

Attorneys and Law Firms

****588** Michael Craig Subit, Jillian M. Cutler, Frank Freed Subit & Thomas LLP, Seattle, WA, for Petitioner.

James M. Shore, Molly Margaret Daily, Stoel Rives LLP, Seattle, WA, for Respondent.

Alison Holcomb, Mark Muzzey Cooke, ACLU of Washington, Matthew Aaron Carvalho, Yarmuth Wilsdon Calfo, PLLC, Seattle, WA, amicus counsel for ACLU of Washington.

Brian Trevor Hodges, Pacific Legal Foundation, Bellevue, WA, Deborah J. La Fetra, Pacific Legal Foundation, Sacramento, CA, amicus counsel for Pacific Legal Foundation.

Jeffrey Lowell Needle, Maynard Building, Lindsay L. Halm, Schroeter Goldmark Bender, Seattle, WA, amicus counsel for Washington Employment Lawyers Association.

Opinion

WIGGINS, J.

***741** ¶ 1 In 1998, the people of Washington exercised their constitutional power to enact legislation by initiative when they adopted the Washington State Medical Use of Marijuana Act (MUMA), chapter 69.51A RCW. MUMA provided an affirmative defense against criminal prosecution of physicians for prescribing medical marijuana and of qualified patients and their designated primary ***742** caregivers for engaging in the medical use of marijuana. In this case, we are asked to decide whether MUMA provides a private cause of action against an employer who discharges an employee for authorized medical marijuana use or whether MUMA expresses a clear public policy that employees may not be discharged for authorized medical marijuana use. We hold that MUMA does not provide a private cause of action for discharge of an employee who uses medical marijuana, either expressly or impliedly, nor does MUMA create a clear public policy that would support a claim for wrongful discharge in violation of such a policy.

FACTS

¶ 2 Jane Roe[1] suffered from debilitating migraine headaches that caused chronic pain, nausea, blurred vision, and sensitivity to light. Roe took over-the-counter pain medication and prescription drugs for her headaches, but she claims conventional medications did not provide significant relief. On June 7, 2006, Dr. William Minteer prescribed Inderal, advised Roe to discontinue other daily pain medication, and discussed with Roe the possibility of a couple of weeks of discomfort after switching to the new drug.

[1] Roe filed suit under a pseudonym because medical marijuana use is illegal under federal law.

¶ 3 On June 26, 2006, Roe became a patient of Dr. Thomas Orvald at The Hemp and Cannabis Foundation (THCF) Medical Clinics in Bellevue. She completed a pain questionnaire, describing her average pain as an 8 ****589** on a 1–to–10 scale (where a 10 represented "[p]ain as bad as you can imagine," Clerk's Papers (CP) at 196), and stating pain medications provided her "20%" relief. *Id.* at 197. Roe also stated that she already used cannabis more than four times a day, totaling around one gram. She stated she would use "50%" more cannabis if it were easier and cheaper to obtain. *Id.* at 194.

¶ 4 That same day, Dr. Orvald provided Roe with a document on THCF letterhead entitled "Documentation of ***743** Medical Authorization to Possess Marijuana for Medical Purposes in Washington State." *Id.* at 269. In the authorization, Dr. Orvald stated he treated Roe for "a terminal illness or a debilitating conditions as defined in RCW 69.51A.010" and in his medical opinion "the potential benefits of the medical use of marijuana would likely outweigh the health risks for this patient." *Id.* Upon receiving the authorization, Roe began using medical marijuana in compliance with MUMA. Medical marijuana alleviated her headache pain with no side effects and allowed Roe to care for her children and to work. Roe only ingests marijuana in her home.

¶ 5 On October 3, 2006, TeleTech offered Roe a position as a customer service representative at its Bremerton facility.[2] The offer was contingent on the results of reference and background checks and a drug screening. Roe was provided with TeleTech's drug policy requiring all employees to have a negative drug test result. The policy emphasized that noncompliance would result in ineligibility for employment with TeleTech. Roe acknowledged receipt of TeleTech's drug policy, informed TeleTech of her use of medical marijuana, and offered to provide the company with a copy of her authorization. TeleTech declined. Roe took a drug test on October 5, 2006, and started training at TeleTech on October 10. She continued to train and work as a customer service representative until October 18, 2006.

[2] TeleTech is a business process outsourcing company based in Colorado. At its Bremerton facility, TeleTech provides Sprint Nextel with telemarketing and telesales services. Customer service representatives at the Bremerton facility handle sales calls and customer service issues.

¶ 6 On October 10, 2006, TeleTech learned of Roe's positive drug test results. Roe's supervisor contacted TeleTech's corporate headquarters and confirmed the company's drug policy does not make an exception for medical marijuana. On October 18, TeleTech terminated Roe's employment.

***744** ¶ 7 In February 2007, Roe sued TeleTech in Kitsap County Superior Court for wrongful termination.[3] Roe claimed (1) TeleTech terminated her employment in violation of MUMA and (2) TeleTech terminated her employment in violation of a clear public policy allowing medical marijuana use in compliance with MUMA. Both parties filed motions for summary judgment. TeleTech asserted MUMA does not provide employment protections to medical marijuana users or a civil cause of action against a private party. It also argued federal law precluded MUMA's authorization of medical marijuana use. Finally, TeleTech argued MUMA has a narrow purpose—namely, to provide users and physicians with an affirmative defense under state drug laws, not to broadly entitle users to employment protections.

[3] TeleTech removed the action to the United States District Court for the Western District of Washington on March 27, 2007, asserting diversity jurisdiction. The federal district court granted Roe's motion to remand the case because TeleTech could not prove that the amount in controversy was at least $75,000. *Roe v. TeleTech Customer Care Mgmt. (Colo.), LLC*, No. C07–5149 RBL, 2007 WL 1655172 (W.D.Wash. June 6, 2007) (unpublished).

¶ 8 The superior court granted TeleTech's motion for summary judgment. Holding that MUMA provides only an affirmative defense to criminal prosecution under state drug laws and does not imply a civil cause of action, the Court of Appeals affirmed the superior court's grant of summary judgment to TeleTech. *Roe v. TeleTech Customer Care Mgmt. (Colo.), LLC*, 152 Wash.App. 388, 216 P.3d 1055 (2009). Based on the unambiguous language of MUMA, we affirm.

ANALYSIS

[1] ¶ 9 We review a lower court's grant of summary judgment and questions of statutory interpretation de novo. *Hubbard v. Spokane* ****590** *County*, 146 Wash.2d

699, 707, 50 P.3d 602 (2002); *Rozner v. City of Bellevue*, 116 Wash.2d 342, 347, 804 P.2d 24 (1991).

***745** I. MUMA does not prohibit an employer from discharging an employee for authorized use of medical marijuana

¶ 10 Washington voters approved Initiative Measure 692 (I–692), MUMA, on November 3, 1998, and it is codified at chapter 69.51A RCW. The purpose section of the statute states: "The people of Washington state find that some patients with terminal or debilitating illnesses, under their physician's care, may benefit from the medical use of marijuana." Former RCW 69.51A.005 (1999). The section identifies some of the conditions "for which marijuana appears to be beneficial," including "some forms of intractable pain." Former RCW 69.51A.005. The section continues:

> The people find that humanitarian compassion necessitates that the decision to authorize the medical use of marijuana by patients with terminal or debilitating illnesses is a personal, individual decision, based upon their physician's professional medical judgment and discretion.
>
> ¶ 11 Therefore, the people of the state of Washington intend that:
>
> Qualifying patients with terminal or debilitating illnesses who, in the judgment of their physicians, would benefit from the medical use of marijuana, shall not be found guilty of a crime under state law for their possession and limited use of marijuana....

Id. The section also states the intent of the voters to provide a defense to caregivers and physicians. *Id.* A subsequent section of MUMA provides an affirmative defense to both qualifying patients and caregivers. RCW 69.51A.040(1).

¶ 12 The only reference to employment in MUMA as passed by the voters in the initiative provided, "Nothing in this chapter requires any accommodation of any medical marijuana use in any place of employment, in any school bus or on any school grounds, or in any youth center." Former RCW 69.51A.060(4) (1999).

***746** ¶ 13 The legislature amended MUMA in 2007, declaring:

> The legislature intends to clarify the law on medical marijuana so that the lawful use of this substance is not impaired and medical practitioners are able to exercise their best professional judgment in the delivery of medical treatment, qualifying patients may fully participate in the medical use of marijuana, and designated providers may assist patients in the manner provided by this act without fear of state criminal prosecution. This act is also intended to provide clarification to law enforcement and to all participants in the judicial system.

Laws of 2007, ch. 371, § 1. The legislature amended MUMA's reference to employment, revising RCW 69.51A.060(4) to read, "Nothing in this chapter requires any accommodation of any *on-site* medical use of marijuana in any place of employment, in any school bus or on any school grounds, in any youth center, *in any correctional facility, or smoking medical marijuana in any public place as that term is defined in RCW 70.160.020.*" RCW 69.51A.060 (2007 amendment italicized).

A. The language of MUMA is unambiguous

[2] [3] [4] [5] [6] ¶ 14 The rules of construction applied to statutes also apply to initiatives. *Amalgamated Transit Union Local 587 v. State*, 142 Wash.2d 183, 205, 11 P.3d 762 (2001). The court's purpose when determining the meaning of a statute enacted by the initiative process is to determine the intent of the voters who enacted the measure. *Id.* This court focuses on the language of the statute "as the average informed voter voting on the initiative would read it." *Id.* If the voters' intent is clear, this court need not look further. *Id.* ("Where the language of an initiative enactment is 'plain, unambiguous, and well understood according to its natural and ordinary sense and meaning, the enactment is not subject to judicial interpretation.' " (quoting *State v. Thorne*, 129 Wash.2d 736, 762–63, 921 P.2d 514 (1996))); *Duke v. Boyd*, 133 Wash.2d 80, 87, 942 P.2d 351 (1997) ("When the words in a statute are clear and unequivocal, ****591** this court is required to assume the Legislature meant exactly what it said and apply the statute as written."). An ambiguity ***747** exists if statutory language "is subject to more than one reasonable interpretation." *In re Marriage of Kovacs*, 121 Wash.2d 795, 804, 854 P.2d 629 (1993). If there is ambiguity in an initiative, the court may look to extrinsic evidence of the voters' intent such as statements in the voters' pamphlet. *Amalgamated Transit*, 142 Wash.2d at 205, 11 P.3d 762.

[7] ¶ 15 Both parties argue this court can determine the meaning of MUMA from the enactment's plain language. Roe claims the original language in RCW 69.51A.005, .040, and .060(4) demonstrates MUMA's sweeping purpose, which was not only to provide an affirmative defense to criminal prosecution, but also to prohibit an employer from discharging an employee for authorized use of medical marijuana. Specifically, Roe argues RCW 69.51A.040's protection against a denial of "any right or privilege" protects an employee from being denied the privilege of employment due to authorized medical marijuana use. In contrast, TeleTech argues MUMA's language unambiguously does not provide employment protections.

[8] ¶ 16 This court will not read a statutory phrase in isolation; its language takes meaning from the enactment as a whole. *Amalgamated Transit*, 142 Wash.2d at 220, 11 P.3d 762; *W. Petroleum Importers, Inc. v. Friedt*, 127 Wash.2d 420, 428, 899 P.2d 792 (1995) ("When construing a statute, we must read it in its entirety, not piecemeal, and interpret the various provisions of the statute in light of one another."). The language upon which Roe relies for her claim that MUMA protects medical marijuana users from denial of the privilege of employment immediately follows MUMA's grant of an affirmative defense to qualifying patients and caregivers:

> If charged with a violation of state law relating to marijuana, any qualifying patient who is engaged in the medical use of marijuana, or any designated primary caregiver who assists a qualifying patient in the medical use of marijuana, will be deemed to have established an affirmative defense to such charges by proof of his or her compliance with the requirements provided in this chapter. Any person meeting the requirements ***748** appropriate to his or her status under this chapter shall be considered to have engaged in activities permitted by this chapter and shall not be penalized in any manner, or denied any right or privilege, for such actions.

Former RCW 69.51A.040(1) (1999). The first sentence of subsection (1) establishes the context of the subsection: it applies to a person charged with violation of state law relating to marijuana. The second sentence applies in this same context of criminal proceedings; it does not address the actions or duties of private entities. *Id.* The section's prohibition against a denial of "any right or privilege," when read in context, does not confer any obligation on private employers.

¶ 17 Roe argues the original language of RCW 69.51A.060(4) confirms that employment is one of the "privileges" protected by RCW 69.51A.040(1). Roe claims that because RCW 69.51A.060(4) explicitly does not require an employer to accommodate medical marijuana use "in any place of employment," the statute implicitly requires an employer to accommodate an employee's medical marijuana use *outside* the workplace. But the statute's explicit statement against an obligation to accommodate on-site use does not require reading into MUMA an implicit obligation to accommodate off-site medical marijuana use.[4] The language of MUMA is unambiguous—it does not regulate the conduct of a private employer or protect an employee from being ****592** discharged because of authorized medical marijuana use.

4 Amicus Pacific Legal Foundation aptly addressed the logical fallacy of Roe's argument. Amicus Curiae Br. of Pac. Legal Found. at 11–13. As amicus explains, when the major premise is a universal negative (employers are not required to accommodate on-site use), and the minor premise negates one aspect of the major (the plaintiff uses marijuana off-site), it is logically invalid to adopt as a conclusion the contrapositive (employers are required to accommodate off-site use). *Id.* at 12 (citing *Bailey v. State*, 16 Md.App. 83, 294 A.2d 123, 129 n. 4 (1972); Ruggero J. Aldisert, *Logic for Lawyers: A Guide to Clear Legal Thinking* 156–58 (3d ed. 1997)). The argument is flawed for the additional reason that the major term—off-site use—does not appear in the major premise. *Id.*

***749** B. Extrinsic evidence does not support an implicit duty to accommodate off-site use of marijuana

1. Drafter's declaration

[9] ¶ 18 Even if the language of MUMA were ambiguous, the extrinsic evidence cited by Roe would not support reading an employment protection into the statute. Roe argues statements by Timothy Killian, a co-drafter and campaign manager for I–692, demonstrate that voters intended MUMA to prohibit the discharge of an employee for authorized use of medical marijuana. In a declaration prepared for this litigation, Killian stated MUMA was intended to broadly protect the right of qualifying patients

to use medical marijuana and to protect the "privilege" of employment.[5]

[5] Citing Killian's declaration, Roe explains, "By providing that employers were not required to accommodate the *use* of medical marijuana *in* any *place* of employment, MUMA was intended to require employers to accommodate an employee's use of marijuana *outside* of the workplace, as long as that use complies with the Act." Appellant's Opening Br. at 5.

¶ 19 Roe claims this court's holdings in *Duke,* 133 Wash.2d 80, 942 P.2d 351, and *Kovacs,* 121 Wash.2d 795, 854 P.2d 629, allow this court to rely on Killian's declaration as evidence of the voters' intent. In both cases, a legislator's statement regarding language in a statute was relevant to the question of the legislature's intent. While "[n]ormally, one legislator's comments from the floor are ... inadequate to establish legislative intent," where the legislator proposed the enacted language and no evidence in the record contradicted the legislator's statement as to the meaning of the language, this court in *Duke* presumed that the legislator "understood the meaning of the amendment which he proposed" and found his statement (made at the time the legislature was debating the bill) supported the plain meaning of the statute. 133 Wash.2d at 87, 942 P.2d 351. Similarly, in *Kovacs* this court acknowledged that individual lawmakers' statements do not conclusively establish legislative intent, but noted such statements can be "instructive" in illustrating the reasons for proposed ***750** changes to legislation. 121 Wash.2d at 807, 854 P.2d 629. In *Kovacs* no evidence in the record contradicted the remarks of a "prime sponsor and drafter of the bill," so it was appropriate to consider his comments when determining the purpose of the statutory language. *Id.* at 807–08, 854 P.2d 629.

¶ 20 While *Duke* and *Kovacs* support looking to statements of individual drafters and sponsors of statutory language, they do not support considering Killian's declaration as evidence of the voters' intent in approving I–692. First, unlike the relevant statements in *Duke* and *Kovacs,* where a legislator made a statement while the legislature was debating the proposed statutory language, Killian made the declaration Roe relies upon almost 10 years after voters approved I–692. In *Duke* and *Kovacs,* the other legislators were aware of the intent of the drafters when they voted on the statute, but in this case, no voter could have been aware in 1998 that Killian would opine in 2008 that the initiative would insulate employees from drug testing for marijuana if the employee qualified for the medical use of marijuana.

¶ 21 Second, the relevant statement in *Duke* supported a plain reading of the statute; the court considered the statement only after finding the amended language "clear." 133 Wash.2d at 86, 942 P.2d 351. In contrast, Killian's declaration claims MUMA contains specific protections that are not supported by the text of the statute. It is the voters' intent that is relevant to the meaning of ambiguous initiative language. If we were to accept Killian's declaration as evidence of the voters' intent, it would give drafters an incentive to write vague language to be expanded in later litigation—language that would not give voters a true representation of the meaning and consequences of the proposed initiative.

2. 2007 changes to MUMA

[10] ¶ 22 In 2007, the legislature stated its intent to clarify the MUMA "so that the lawful use of [medical marijuana] is not impaired...." Laws of 2007, ch. 371, § 1. The legislature ***751** added "on-site" to ****593** RCW 69.51A.060(4) so that it now provides, in relevant part, "[n]othing in this chapter requires any accommodation of any *on-site* medical use of marijuana in any place of employment." (Emphasis added.) Roe argues the 2007 enactment shows that the limits on workplace accommodation obligations set forth in I–692 were always intended to apply only to the *on-site* use of medical marijuana.

[11] [12] [13] [14] ¶ 23 If a statute is ambiguous, we may look to the statute's subsequent history to clarify the original legislative intent.[6] *State v. Bunker,* 169 Wash.2d 571, 581, 238 P.3d 487 (2010). A new legislative enactment is presumed to be an amendment that changes a law rather than a clarification of the existing law, but the presumption may be rebutted by clear evidence that the legislature intended an interpretive clarification. *State v. Elmore,* 154 Wash.App. 885, 905, 228 P.3d 760 (2010) (citing *Johnson v. Morris,* 87 Wash.2d 922, 926, 557 P.2d 1299 (1976)). One indication a new enactment is a clarification is that the original statute was ambiguous. *Elmore,* 154 Wash.App. at 905, 228 P.3d 760. In contrast, an amendment generally changes an unambiguous statute. *Id.*

[6] Subsequent legislative changes to a statute can be evidence of the legislative intent of the original statute. *State v. Mendoza,* 165 Wash.2d 913, 921, 205 P.3d 113 (2009). But the 2007 legislative changes to MUMA amended or clarified an initiative passed by the voters. Because we do not find the changes helpful to Roe's position, we briefly address the 2007 changes to MUMA without deciding whether *legislative* changes

> to an initiative may be evidence of the *voters'* intent in approving the original initiative.

¶ 24 Even assuming the 2007 enactment clarified the rights and obligations created by the original initiative, the clarifying language does not support Roe's argument that MUMA provides employment protections for authorized medical marijuana users. The legislature's addition of the phrase "on-site" to RCW 69.51A.060(4) is redundant because the section already expressly disavowed any accommodation obligation "in any place of employment." The addition of "on-site" did not make any material change in the section. Neither the original nor the current language of ***752** MUMA requires employers to accommodate an employee's off-site use of medical marijuana.

¶ 25 Roe claims using medical marijuana in her home in the evening allowed her to be productively employed the next day, acknowledging that the use of marijuana continues to influence a patient for some time after ingestion. One would expect any statute creating employment protections for authorized medical marijuana users might include exceptions for certain occupations or permissible levels of impairment on the job. Indeed, describing MUMA's alleged employment protections, Roe argues an employer only has a duty to accommodate an employee's off-site medical marijuana use if the employee's use would not affect job safety or performance. But nothing in MUMA suggests the drafters or voters considered such issues or contemplated the regulatory scheme suggested by Roe's proposed safety and performance exceptions. This statutory silence supports the conclusion that MUMA does not require employers to accommodate off-site medical marijuana use.

3. Voters pamphlet

¶ 26 If a statute passed by initiative is ambiguous, the voters pamphlet may provide extrinsic evidence of the voters' intent. *Amalgamated Transit,* 142 Wash.2d at 205, 11 P.3d 762. The official ballot title of I–692 was, "Shall the medical use of marijuana for certain terminal or debilitating conditions be permitted, and physicians authorized to advise patients about medical use of marijuana?" State of Washington *Voters Pamphlet,* General Election 8 (Nov. 3, 1998) (1998 Voters Pamphlet). The attorney general's statement explained that the initiative would not "require the accommodation of any medical use of marijuana in any place of employment...." *Id.* at 16. In the "Statement For" I–692, proponents of the initiative stated, "[P]atients who use medical marijuana, and doctors who recommend it, are still considered criminals in this state. Initiative 692 will protect patients who suffer from terminal and debilitating illnesses, and doctors who recommend the use of medical ***753** marijuana. That's why we need I–692." *Id.* at 8. The only statement in the voters' ****594** materials referencing employment was also in the "Statement For" I–692, where proponents assured voters that MUMA would "[p]rohibit[ ] marijuana use ... in the workplace."[7] *Id.* The "Statement Against" I–692 was silent as to any employment protections possibly granted by I–692. *Id.* at 9.

[7] The proponents of I–692 overstated MUMA's "[s]afeguards." 1998 Voters Pamphlet at 8. Nothing in MUMA prohibits an employer from choosing to accommodate an employee's use of medical marijuana.

¶ 27 Nothing in the 1998 Voters Pamphlet demonstrates that an average voter would understand the proposed initiative to offer employment protections to medical marijuana users. If proponents of I–692 wanted voters to approve language that would enact employment protections, they should have clearly explained to voters the consequences of the initiative. *See Ross v. RagingWire Telecomms., Inc.,* 42 Cal.4th 920, 929, 174 P.3d 200, 70 Cal.Rptr.3d 382 (2008) (holding that proponents of California's Compassionate Use Act of 1996, Cal. Health & Safety Code § 11362.5, intended a delicate balance and presented only "modest objectives" to the voters that could not support a broad reading of the act to include employment protections that were not in the text of the statute).

C. MUMA does not imply a civil remedy

[15] ¶ 28 In addition to arguing that MUMA creates an express civil remedy, Roe claims that the court should find in MUMA an implied cause of action for wrongful discharge for authorized medical marijuana use. In *Bennett v. Hardy,* 113 Wash.2d 912, 920–21, 784 P.2d 1258 (1990), this court established the test for an implied cause of action:

> Borrowing from the test used by federal courts in determining whether to imply a cause of action, we must resolve the following issues: first, whether the plaintiff is within the class for whose "especial" benefit the statute was

> enacted; second, whether the legislative intent, explicitly or implicitly, supports creating or denying a remedy; and third, whether implying a ***754** remedy is consistent with the underlying purpose of the legislation.

If MUMA protects medical marijuana users by proscribing certain conduct or creating a duty, but does not provide a remedy for a violation of the statute, a cause of action may be inferred if " 'the remedy is appropriate in furtherance of the purpose of the legislation and needed to assure the effectiveness of the provision.' " *Id.* at 920, 784 P.2d 1258 (quoting Restatement (Second) of Torts § 874A (1979)).

¶ 29 The first *Bennett* requirement is not at issue because Roe, as a medical marijuana user, is within the class for whose special benefit the people approved I–692. However, as discussed above, there is no evidence voters intended MUMA to provide employment protections or to prohibit an employer from discharging an employee for medical marijuana use. Further, implying a cause of action against a private entity is inconsistent with a statutory scheme intended to provide an affirmative defense to state criminal prosecution. MUMA does not imply a cause of action against an employer.[8]

[8] This case is distinguishable from our recent decision in *Beggs v. Department of Social & Health Services*, 171 Wash.2d 69, 247 P.3d 421 (2011), where we found an implied cause of action in the mandatory child abuse reporting statute, RCW 26.44.030. First, the reporting statute grants immunity from civil liability, implying civil liability exists. *Id.* at 78, 247 P.3d 421. In contrast, MUMA grants qualified patients and caregivers immunity from criminal liability. RCW 69.51A.040(1). Second, the cause of action implied by the reporting statute is consistent with the purpose of the statute—to safeguard children. Here, the purpose of MUMA is to insulate qualified patients and caregivers from criminal liability under state law, not to create an expansive right to use medical marijuana without regard to other restrictions.

II. MUMA does not proclaim a sufficient public policy to support a cause of action for wrongful termination

[16] [17] [18] ¶ 30 Common law at-will employment has been the default employment rule in Washington since at least 1928. *Ford v. Trendwest Resorts, Inc.*, 146 Wash.2d 146, 152, 43 P.3d 1223 (2002) (citing *Davidson v. Mackall–Paine Veneer Co.*, 149 Wash. 685, 688, 271 P. 878 (1928)). An employer may discharge an at-will employee for "no cause, ****595** good cause or ***755** even cause morally wrong without fear of liability." *Thompson v. St. Regis Paper Co.*, 102 Wash.2d 219, 226, 685 P.2d 1081 (1984). One narrow exception to the general at-will employment rule prohibits an employer from discharging an employee "when the termination would frustrate a clear manifestation of public policy." *Ford*, 146 Wash.2d at 153, 43 P.3d 1223.

A. A public policy mandate giving rise to a wrongful termination action must be clear

¶ 31 This court added Washington to the growing list of jurisdictions to recognize an action for wrongful termination in violation of public policy in 1984, stating:

> "In determining whether a clear mandate of public policy is violated, courts should inquire whether the employer's conduct contravenes the letter or purpose of a constitutional, statutory, or regulatory provision or scheme. Prior judicial decisions may also establish the relevant public policy. However, *courts should proceed cautiously if called upon to declare public policy absent some prior legislative or judicial expression on the subject.*"

Thompson, 102 Wash.2d at 232, 685 P.2d 1081 (quoting *Parnar v. Americana Hotels, Inc.*, 65 Haw. 370, 652 P.2d 625, 631 (1982)). The tort action is a "narrow public policy exception" to the at-will employment doctrine that balances the employee's interest in job security and the employer's interest in making personnel decisions without fear of liability. *Id.*

¶ 32 *Gardner v. Loomis Armored, Inc.*, 128 Wash.2d 931, 913 P.2d 377 (1996), refined the analysis of the action, recognizing that the action has generally arisen in the past in four situations:

> (1) where employees are fired for refusing to commit an illegal act; (2) where employees are fired for performing a public duty or obligation, such as serving jury duty; (3) where employees are fired for exercising a legal right or

> privilege, such as filing workers' compensation claims; and (4) where employees are fired in retaliation for reporting employer misconduct, i.e., whistleblowing.

Id. at 936, 913 P.2d 377.

[19] [20] [21] ***756** ¶ 33 The test we use to analyze a public policy wrongful discharge action where both the employee and the employer have legitimate interests requires four elements:

> (1) The plaintiffs must prove the existence of a clear public policy (the *clarity* element).
>
> (2) The plaintiffs must prove that discouraging the conduct in which they engaged would jeopardize the public policy (the *jeopardy* element).
>
> (3) The plaintiffs must prove that the public-policy-linked conduct caused the dismissal (the *causation* element).
>
> (4) The defendant must not be able to offer an overriding justification for the dismissal (the *absence of justification* element).

Id. at 941, 913 P.2d 377 (citations omitted). Whether a clear public policy exists is a question of law subject to de novo review. *Danny v. Laidlaw Transit Servs., Inc.*, 165 Wash.2d 200, 207, 193 P.3d 128 (2008). The exception should be narrowly drawn so that it does not swallow the general rule of at-will employment. *Sedlacek v. Hillis*, 145 Wash.2d 379, 389–90, 36 P.3d 1014 (2001).

B. MUMA does not proclaim a public policy prohibiting the discharge of an employee for medical marijuana use

[22] ¶ 34 A statute may provide a public policy mandate for purposes of a wrongful termination claim even where the employer's conduct is beyond the reach of the statute's remedies. *See Roberts v. Dudley*, 140 Wash.2d 58, 71, 993 P.2d 901 (2000).[9] Thus, ****596** though MUMA does not imply a cause of action against an employer who discharges an employee for ***757** using medical marijuana, it could still provide the basis for Roe's wrongful termination claim.

[9] In *Roberts*, an employee claimed she was discharged because she was pregnant. She brought an action for wrongful termination in violation of a clear public policy against sex discrimination. *Id.* at 62, 993 P.2d 901. This court found support for the public policy under chapter 49.60 RCW, a statute that prohibits employment discrimination on the basis of sex. *Id.* at 69–70, 993 P.2d 901. Though the employer in *Roberts* was immune from liability under chapter 49.60 RCW because it employed fewer than eight employees, the statute established a clear public policy for purposes of the employee's wrongful termination claim. *Id.* at 71, 993 P.2d 901.

¶ 35 An employee must establish a clear statement of public policy to satisfy the clarity element. *Hubbard v. Spokane County*, 146 Wash.2d 699, 708, 50 P.3d 602 (2002). "The 'public policy' for which we search is an authoritative public declaration of the nature of the wrong." *Roberts*, 140 Wash.2d at 63, 993 P.2d 901 (quoting *Thompson*, 102 Wash.2d at 232, 685 P.2d 1081). A clear mandate of public policy sufficient to meet the clarity element must be clear and truly public; it does not exist merely because the plaintiff can point to legislation or judicial precedent that addresses the relevant issue. *Sedlacek*, 145 Wash.2d at 389, 36 P.3d 1014.

[23] ¶ 36 The employee bears the burden to establish that a clear statement of public policy exists. *Hubbard*, 146 Wash.2d at 708, 50 P.3d 602. Roe argues MUMA proclaims a broad policy that " 'the medical use of marijuana by patients with terminal or debilitating illnesses is a personal, individual decision.' " Appellant's Opening Br. at 27–28 (quoting RCW 69.51A.005). Roe also claims Washington courts have recognized that MUMA's purpose is to protect the right of qualifying patients to use medical marijuana in accordance with the advice and supervision of their physicians.

[24] ¶ 37 MUMA's language and court decisions interpreting the statute do not support such a broad public policy that would remove all impediments to authorized medical marijuana use or forbid an employer from discharging an employee because she uses medical marijuana. MUMA's only reference to employment is an explicit statement against requiring employers to accommodate medical marijuana use. *See* RCW 69.51A.060(4) ("Nothing in this chapter requires any accommodation of any on-site medical use of marijuana in any place of employment...."). Similarly, the only reference to employment in the 1998 Voters Pamphlet asserted the initiative would prohibit marijuana use in the workplace.

¶ 38 Moreover, the statement upon which Roe relies for the broad proposition that the choice to use medical marijuana ***758** is a "personal, individual decision"

logically refers to the decision of the physician, not the patient. The full sentence reads: "The people find that humanitarian compassion necessitates that the decision to authorize the medical use of marijuana by patients with terminal or debilitating illnesses is a personal, individual decision, based upon their health care professional's professional medical judgment and discretion." RCW 69.51A.005. The "decision" referred to in the first part of the sentence is the "decision to authorize the medical use of marijuana ...," which is the physician's decision, not the patient's. The decision is "based upon their health care professional's professional medical judgment and discretion," which again refers to the physician's decision, not the patient's decision. This sentence of RCW 69.51A.005 does not support a broad public policy supporting employment protections for medical marijuana users.

¶ 39 The Court of Appeals has frequently quoted the general purpose section of MUMA, but no court decision has provided "an authoritative public declaration" declaring an unimpeded right to use medical marijuana or prohibiting an employer from discharging an employee for medical marijuana use. *Roberts,* 140 Wash.2d at 63, 993 P.2d 901. Citing RCW 69.51A.005, the Court of Appeals in *State v. Hanson* stated MUMA's purpose is "to allow patients with terminal or debilitating illness to legally use marijuana when authorized by their physician." 138 Wash.App. 322, 329, 157 P.3d 438 (2007). However, the *Hanson* court recognized that MUMA does not provide unlimited authorization to use medical marijuana, stating "use is permitted if specific legislative procedures are followed" and "the Medical Marijuana Act only provides an affirmative defense to the drug crime." *Id.* at 330, 157 P.3d 438. Similarly in *State v. Ginn,* the Court of Appeals stated the general purpose of MUMA "is to allow patients with terminal or debilitating illnesses to use marijuana." 128 Wash.App. 872, 877, 117 P.3d 1155 (2005). But the court discussed MUMA's purpose in the context of applying the affirmative defense ****597** provided by the statute to ***759** qualifying patients and physicians. *Id.* Washington court decisions do not recognize a broad public policy that would remove any impediment to medical marijuana use or impose an employer accommodation obligation.

¶ 40 Finally, Washington patients have no legal right to use marijuana under federal law. *See* 21 U.S.C. §§ 812, 844(a). Though Roe claims the divergence between Washington's MUMA and federal drug law is of no consequence to a state tort claim for wrongful discharge, the two cannot be completely separated.[10] Holding that a broad public policy exists that would require an employer to allow an employee to engage in illegal activity would not be within *Thompson*'s directive to "proceed cautiously" when finding a public policy exception to the at-will employment doctrine. *Thompson,* 102 Wash.2d at 232, 685 P.2d 1081.

[10] We note that the Washington State Human Rights Commission, the agency charged with investigating employee discrimination claims, acknowledges that "it would not be a reasonable accommodation of a disability for an employer to violate federal law, or allow an employee to violate federal law, by employing a person who uses medical marijuana." Laura Lindstrand, Wash. State Human Rights Comm'n, Washington Non-discrimination Laws and the Use of Medical Marijuana at 1 (June 7, 2011), *available at* http://www.hum.wa.gov/Documents/Guidance/medical % 20marijuana.doc. Though an employee is still free to sue an employer for wrongful discharge, the commission will not investigate claims of discrimination due to medical marijuana use because federal law prohibits marijuana possession. *Id.* at 2.

¶ 41 Roe has presented only one public policy argument to support her wrongful termination claim—that MUMA broadly protects a patient's "personal, individual decision" to use medical marijuana. MUMA does not proclaim a public policy that would remove any impediment (including employer drug policies) to the decision to use medical marijuana.[11] Because Roe has not satisfied the clarity ***760** element, we do not need to analyze the other elements of the *Gardner* test. *See Gardner,* 128 Wash.2d at 943, 913 P.2d 377.

[11] In *Gardner,* the employee, discharged because he left his armored vehicle to help a hostage in a bank robbery, claimed statutes supported a public policy encouraging citizens to help law enforcement. 128 Wash.2d at 942, 913 P.2d 377. This court held that the cited statutes supported such a policy, "but only under very limited circumstances." *Id.* More accurately, the statutes supported a policy encouraging citizens to cooperate with law enforcement when help was requested or required by law. *Id.* This court concluded, "A limited, albeit clear, public policy can be found in the cited statutes, but Plaintiffs give an overexpansive reading of those statutes in their attempt to present a general policy encouraging citizens to help in law enforcement. Plaintiffs have not satisfied the clarity element with respect to their first offered public policy." *Id.* at 942–43, 913 P.2d 377. Similarly, Roe has given an overexpansive reading of MUMA in her attempt to present a general public policy providing an unimpeded right to use medical marijuana with a physician's authorization. MUMA does not provide such an unlimited right.

CONCLUSION

¶ 42 MUMA does not prohibit an employer from discharging an employee for medical marijuana use, nor does it provide a civil remedy against the employer. MUMA also does not proclaim a sufficient public policy to give rise to a tort action for wrongful termination for authorized use of medical marijuana.

¶ 43 We affirm.

WE CONCUR: BARBARA A. MADSEN, Chief Justice, CHARLES W. JOHNSON, GERRY L. ALEXANDER, SUSAN OWENS, MARY E. FAIRHURST, JAMES M. JOHNSON, and DEBRA L. STEPHENS, Justices.

CHAMBERS, J., (dissenting).

> ¶ 44 The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.
> ****598** Oliver Wendell Holmes, The Common Law 5 (Mark DeWolfe Howe ed., 1967) (1881). The court today makes an exacting, logically defensible, minute examination of the Washington State Medical Use of Marijuana Act, chapter 69.51A RCW, and concludes that our law, like conventional medicine, affords Jane Roe no relief. But the approach it takes would ***761** have forestalled significant developments in the law. *See, e.g., Gardner v. Loomis Armored, Inc.*, 128 Wash.2d 931, 913 P.2d 377 (1996). Because I conclude that a jury should hear Roe's claim for wrongful discharge in violation of public policy, I respectfully dissent.

¶ 45 I stress a few of the salient facts. The people of our state enacted the medical marijuana act by initiative because they concluded that "humanitarian compassion necessitates that the decision to authorize the medical use of marijuana by patients with terminal or debilitating illnesses is a personal, individual decision, based upon their physician's professional medical judgment and discretion." Laws of 1999, ch. 2, § 2 (Initiative Measure 692, approved Nov. 3, 1998) (codified as RCW 69.51A.005). It says plainly that "[a]ny person meeting the requirements appropriate to his or her status under this chapter shall be considered to have engaged in activities permitted by this chapter *and shall not be penalized in any manner, or denied any right or privilege,* for such actions." *Id.* § 5 (emphasis added) (codified as RCW 69.51A.040(1)).

¶ 46 Roe seems to be exactly the sort of person the people intended to protect. She suffered from debilitating migraine headaches that resisted treatment. A doctor advised her that the potential benefits of marijuana likely outweighed the health risks. Her migraines subsided enough that she could seek and find a job.

¶ 47 The tort of wrongful discharge in violation of public policy exists to protect Washington workers in such straits. "(1) The plaintiffs must prove the existence of a clear public policy (the *clarity* element)," (2) "that discouraging the conduct in which they engaged would jeopardize the public policy (the *jeopardy* element)," "(3) that the public-policy-linked conduct caused the dismissal (the causation element)," and "(4) The defendant must not be able to offer an overriding justification for the dismissal (the *absence of justification* element)." *Gardner*, 128 Wash.2d at 941, 913 P.2d 377 (citing Henry H. Perritt, Jr., Workplace Torts: Rights and Liabilities §§ 3.7, 3.14, 3.19, 3.21 (1991)); *see also Danny v. Laidlaw* ***762** *Transit Servs., Inc.*, 165 Wash.2d 200, 207, 193 P.3d 128 (2008).

¶ 48 In my view, the first element is easily satisfied. The public policy is clear and is stated on the first page of the act. "The people find that humanitarian compassion necessitates that the decision to authorize the medical use of marijuana by patients with terminal or debilitating illnesses is a personal, individual decision, based upon their health care professional's professional medical judgment and discretion." RCW 69.51A.005; *see also* RCW 69.51A.040(1) ("Any person meeting the requirements appropriate to his or her status under this chapter shall be considered to have engaged in activities permitted by this chapter and shall not be penalized in any manner, or denied any right or privilege, for such actions."). This court has also recognized this clear policy. "As a compassionate gesture, the people of this state, by initiative, allowed patients afflicted with medical conditions that might be eased by marijuana to use it

under limited circumstances." *State v. Fry*, 168 Wash.2d 1, 14, 228 P.3d 1 (2010) (Chambers, J., concurring); *accord Fry*, 168 Wash.2d at 20, 228 P.3d 1 (Sanders, J., dissenting). True, the act's operative sections focus on creating an affirmative defense. But this language is broad and we undermine the people's will by treating it as merely decorative. Even the limitations in the act support finding a policy in favor of allowing medical marijuana in situations like this one. The initiative said that "[n]othing in this chapter requires any accommodation of any medical use of marijuana in any placement of employment, in any school bus or on any school grounds, or in any youth center." Laws of 1999, ch. 2, § 8(4) (Initiative Measure 692, approved Nov. 3, 1998). Since then, the legislature has clarified that last provision to say that "[n]othing in this chapter requires any accommodation of any *on-site* medical use of marijuana in any place of employment," ****599** clearly indicating a legislative intent that off-site use does require accommodation. RCW 69.51A.060(4) (emphasis added).

¶ 49 To satisfy the jeopardy element, Roe must show that " 'discouraging the conduct in which [she] engaged would ***763** jeopardize the public policy' " and " '*directly relates* to the public policy, or was *necessary* for the effective enforcement of the public policy.' " *Danny*, 165 Wash.2d at 222, 193 P.3d 128 (quoting *Gardner*, 128 Wash.2d at 941, 945, 913 P.2d 377). She has met this burden. Allowing someone to be fired from their job for using the treatment allowed by law when sanctioned by a doctor jeopardizes the clear policy of the act. It will discourage other people in her position from availing themselves of a treatment the voters decided should be available.

¶ 50 The third element is undisputed: Roe's protected conduct caused her employer to fire her.

¶ 51 The fourth is best left to a jury. While I am unpersuaded that federal law prohibits TeleTech Customer Case Management (Colorado) LLC from following Washington law on this subject, the employer may well have an overriding reason not to permit an employee to medicate with marijuana. Based on the record and briefing before us, I would leave that question to a jury.

¶ 52 Neither I nor the law would require employers to employ drug impaired workers. The law is intended to treat marijuana like any other medication. It is well established that employers must "reasonably accommodate a disabled employee unless the accommodation would be an undue hardship on the employer." *Riehl v. Foodmaker, Inc.*, 152 Wash.2d 138, 145, 94 P.3d 930 (2004) (citing *Pulcino v. Fed. Express Corp.*, 141 Wash.2d 629, 639, 9 P.3d 787 (2000)). Quite often, marijuana is used to treat conditions that would qualify as a disability. *Compare* RCW 69.51A.010 (listing some of the qualifying conditions), *with* RCW 49.60.040(7)(a) (defining "disability" for purposes of the Washington Law Against Discrimination, chapter 49.60 RCW). As I read the law, an employer is only required to *reasonably* accommodate the disability through accepting the treatment to the extent such accommodation does not impose an undue hardship. *Riehl*, 152 Wash.2d at 145, 94 P.3d 930.

¶ 53 Unfortunately, TeleTech has a drug screening policy that prohib its employees from having any evidence of medical marijuana in the employee's system without regard for ***764** whether the medical marijuana was consumed "on site," whether the medical marijuana affects the employee's job performance, or whether the employer can reasonably accommodate the employee's medical use. This case, along with many others, shows that the act is in need of legislative review. *E.g. State v. Tracy*, 158 Wash.2d 683, 147 P.3d 559 (2006). To that end, I urge the legislature to thoughtfully review and improve the act.

¶ 54 I respectfully dissent.

All Citations

171 Wash.2d 736, 257 P.3d 586, 32 IER Cases 638, 24 A.D. Cases 1281

End of Document

42 Cal.4th 920
Supreme Court of California

Gary ROSS, Plaintiff and Appellant,
v.
RAGINGWIRE TELECOMMUNICATIONS, INC.,
Defendant and Respondent.

No. S138130.
|
Jan. 24, 2008.

Synopsis

Background: Newly hired employee filed action against former employer, alleging violation of California Fair Employment and Housing Act (FEHA), in that firing him for failing a marijuana test violated the Compassionate Use Act of 1996, permitting medicinal use of marijuana. The Superior Court, Sacramento County, No. 02AS05476, Joe S. Gray, J., sustained employer's demurrer and dismissed action. Employee appealed. The Court of Appeal affirmed. The Supreme Court granted employee's petition for review, superseding the opinion of the Court of Appeal.

Holdings: The Supreme Court, Werdegar, J., held that:

[1] FEHA did not require employer to accommodate employee who used medicinal marijuana, and

[2] employee did not state cause of action for termination in violation of public policy.

Affirmed.

Kennard, J., filed a concurring and dissenting opinion, in which Moreno, J., joined.

Opinion, 33 Cal.Rptr.3d 803, superseded.

Attorneys and Law Firms

*****384** Joseph D. Elford, Oakland; Law Office of Stewart Katz, Stewart Katz and Costa Kerestenzis, Sacramento, for Plaintiff and Appellant.

Robert A. Raich, Oakland, for California legislators as Amicus Curiae on behalf of Plaintiff and Appellant.

Daniel Abrahamson, Tamar Todd and Theshia Naidoo, for American Pain Foundation, American Medical Women's Association, Lymphoma Foundation of America, American Nurses Association, California Nurses' Association, AIDS Action Council, National Women's Health Network, Doctors of the World–USA and Gay Men's Health Crisis as Amici Curiae on behalf of Plaintiff and Appellant.

Theodore Cody, Los Angeles, and David Goldberg, for Protection and Advocacy, Inc., and Equal Rights Advocates as Amici Curiae on behalf of Plaintiff and Appellant.

Jackson Lewis, D. Gregory Valenza, Marlena G. Gibbons, Patrick C. Mullin, Timothy C. Travelstead and Robert M. Pattison, San Francisco, for Defendant and Respondent.

Deborah J. La Fetra, Sacramento, for Pacific Legal Foundation as Amicus Curiae on behalf of Defendant and Respondent.

Suzanne B. Gifford and Richard A. Katzman, San Jose, for Santa Clara Valley Transportation Authority as Amicus Curiae on behalf of Defendant and Respondent.

Cook Brown, Dennis B. Cook, Sacramento, and Ronald E. Hofsdal, for Western Electrical Contractors Association as Amicus Curiae on behalf of Defendant and Respondent.

Opinion

WERDEGAR, J.

***923 **202** The Compassionate Use Act of 1996 (Health & Saf.Code, § 11362.5, added by *****385** initiative, Prop. 215, as approved by voters, Gen. Elec. (Nov. 5, 1996)) gives a person who uses marijuana for medical purposes on a physician's recommendation a defense to certain state criminal charges involving the drug, including possession (Health & Saf.Code, § 11357; see *id.*, § 11362.5, subd. (d)). Federal law, however, continues to prohibit the drug's possession, even by medical users. (21 U.S.C. §§ 812, 844(a)); see ***924** *gonzales v. raich* (2005) 545 U.S. 1, 26–29, 125 S.Ct. 2195, 162 L.Ed.2d 1; *United States v. Oakland Cannabis Buyers' Cooperative* (2001) 532 U.S. 483, 491–495, 121 S.Ct. 1711, 149 L.Ed.2d 722.

[1] Plaintiff, whose physician recommended he use marijuana to treat chronic pain, was fired when a preemployment drug test required of new employees revealed his marijuana use. The lower courts held plaintiff could not on that basis state a cause of action against his employer for disability-based discrimination under the California Fair Employment and Housing Act (Gov.Code, § 12900 et seq.; see *id.*, § 12940, subd. (a); hereafter the FEHA) or for wrongful termination in violation of public policy (see, e.g., *Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 887, 66 Cal.Rptr.2d 888, 941 P.2d 1157; ****203** *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 170, 176–178, 164 Cal.Rptr. 839, 610 P.2d 1330). We conclude the lower courts were correct: Nothing in the text or history of the Compassionate Use Act suggests the voters intended the measure to address the respective rights and duties of employers and employees. Under California law, an employer may require preemployment drug tests and take illegal drug use into consideration in making employment decisions. (*Loder v. City of Glendale* (1997) 14 Cal.4th 846, 882–883, 59 Cal.Rptr.2d 696, 927 P.2d 1200.) We thus affirm.

I. FACTS

[2] This case comes to us on review of a judgment entered after the superior court sustained a demurrer to plaintiff's complaint without leave to amend. In this procedural posture, the only question before us is whether plaintiff can state a cause of action. In reviewing the complaint to answer that question, we treat the demurrer as admitting the complaint's well-pleaded allegations of material fact, but not its contentions, deductions or conclusions of law. (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6, 40 Cal.Rptr.3d 205, 129 P.3d 394; *Serrano v. Priest* (1971) 5 Cal.3d 584, 591, 96 Cal.Rptr. 601, 487 P.2d 1241.) The complaint's allegations may be summarized for this purpose as follows:

Plaintiff Gary Ross suffers from strain and muscle spasms in his back as a result of injuries he sustained while serving in the United States Air Force. Because of his condition, plaintiff is a qualified individual with a disability under the FEHA and receives governmental disability benefits. In September 1999, after failing to obtain relief from pain through other medications, plaintiff began to use marijuana on his physician's recommendation pursuant to the Compassionate Use Act.

On September 10, 2001, defendant RagingWire Telecommunications, Inc., offered plaintiff a job as lead systems administrator. Defendant required plaintiff to take a drug test. Before taking the test, plaintiff gave the clinic that ***925** would administer the test a copy of his physician's recommendation for marijuana. Plaintiff took the test on September 14 and began work on September 17. Later that week, the clinic informed plaintiff by telephone that he had tested positive for tetrahydrocannabinol (THC), a chemical found in marijuana. On September 20, defendant informed plaintiff he was being suspended as a result of the drug test. Plaintiff gave *****386** defendant a copy of his physician's recommendation for marijuana and explained to defendant's human resources director that he used marijuana for medical purposes to relieve his chronic back pain. Defendant's representative told plaintiff that defendant would call his physician, verify the recommendation, and advise him of defendant's decision regarding his employment. On September 21, defendant's board of directors met to discuss the matter and, on September 25, defendant's chief executive officer informed plaintiff that he was being fired because of his marijuana use.

Plaintiff's disability and use of marijuana to treat pain, he alleges, do not affect his ability to do the essential functions of the job for which defendant hired him. Plaintiff has worked in the same field since he began to use marijuana and has performed satisfactorily, without complaints about his job performance.

Based on these allegations, plaintiff alleges defendant violated the FEHA by discharging him because of, and by failing to make reasonable accommodation for, his disability. (Gov.Code, § 12940, subd. (a).) Plaintiff also alleges defendant terminated his employment wrongfully, in violation of public policy. (See *Stevenson v. Superior Court*, *supra*, 16 Cal.4th 880, 887, 66 Cal.Rptr.2d 888, 941 P.2d 1157; *Tameny v. Atlantic Richfield Co.*, *supra*, 27 Cal.3d 167, 170, 176–178, 164 Cal.Rptr. 839, 610 P.2d 1330.) The superior court sustained defendant's demurrer without leave to amend and entered judgment for defendant. The Court of Appeal affirmed. We granted plaintiff's petition for review.

II. DISCUSSION

A. The FEHA

[3] The FEHA declares and implements the state's public policy against discrimination in employment. (Gov.Code, §§ 12920–12921.) The particular section of the FEHA under which plaintiff attempts to state a ****204** claim, Government Code section 12940, provides that "[i]t shall

be an unlawful employment practice ... [¶] (a) For an employer, because of the ... physical disability [or] medical condition ... of any person, to refuse to hire or employ the person ... or to bar or to discharge the person from employment....” An employer may discharge or refuse to hire a person who, because of a disability or medical condition, “is unable to perform his or her ***926** essential duties even with reasonable accommodations.” (*Id.*, § 12940, subd. (a)(1) & (2).) The FEHA thus inferentially requires employers in their hiring decisions to take into account the feasibility of making reasonable accommodations.

[4] Plaintiff, seeking to bring himself within the FEHA, alleges he has a physical disability in that he “suffers from a lower back strain and muscle spasms in his back....” He uses marijuana to treat the resulting pain. Marijuana use, however, brings plaintiff into conflict with defendant’s employment policies, which apparently deny employment to persons who test positive for illegal drugs. By denying him employment and failing to make reasonable accommodation, plaintiff alleges, defendant has violated the FEHA. Plaintiff does not in his complaint identify the precise accommodation defendant would need to make in order to enable him to perform the essential duties of his job. One may fairly infer from plaintiff’s allegations, however, that he is asking defendant to accommodate his use of marijuana at home by waiving its policy requiring a negative drug test of new employees.[1] “Just as it would violate the FEHA to fire an employee *****387** who uses insulin or Zoloft,” plaintiff argues, “it violates [the] statute to terminate an employee who uses a medicine deemed legal by the California electorate upon the recommendation of his physician.” In this way, plaintiff reasons, “the [FEHA] works together with the Compassionate Use Act ... to provide a remedy to [him].”

1 Plaintiff expressly disclaims any intention to use or possess marijuana at work.

[5] Plaintiff’s position might have merit if the Compassionate Use Act gave marijuana the same status as any legal prescription drug. But the act’s effect is not so broad. No state law could completely legalize marijuana for medical purposes because the drug remains illegal under federal law (21 U.S.C. §§ 812, 844(a)), even for medical users (see *Gonzales v. Raich, supra,* 545 U.S. 1, 26–29, 125 S.Ct. 2195, 162 L.Ed.2d 1; *United States v. Oakland Cannabis Buyers’ Cooperative, supra,* 532 U.S. 483, 491–495, 121 S.Ct. 1711, 149 L.Ed.2d 722). Instead of attempting the impossible, as we shall explain, California’s voters merely exempted medical users and their primary caregivers from criminal liability under two specifically designated state statutes. Nothing in the text or history of the Compassionate Use Act suggests the voters intended the measure to address the respective rights and obligations of employers and employees.

The FEHA does not require employers to accommodate the use of illegal drugs. The point is perhaps too obvious to have generated appellate litigation, but we recognized it implicitly in *Loder v. City of Glendale, supra,* 14 Cal.4th 846, 59 Cal.Rptr.2d 696, 927 P.2d 1200 (*Loder*). Among the questions before us in *Loder* was whether an employer could require prospective employees to undergo testing for illegal drugs and alcohol, and whether the employer could have access to the ***927** test results, without violating California’s Confidentiality of Medical Information Act (Civ.Code, § 56 et seq.). We determined that an employer could lawfully do both.[2] In reaching this conclusion, we relied on a regulation adopted under the authority of the FEHA (Cal.Code Regs., tit. 2, § 7294.0, subd. (d); see Gov.Code, § 12935, subd. (a)) that permits an employer to condition an offer of employment on the results of a medical examination. (*Loder,* at p. 865, 59 Cal.Rptr.2d 696, 927 P.2d 1200; see also *id.* at pp. 861–862, 59 Cal.Rptr.2d 696, 927 P.2d 1200.) We held that such an examination may include drug testing and, in so holding, ****205** necessarily recognized that employers may deny employment to persons who test positive for illegal drugs. The employer, we explained, was “ seeking information that [was] relevant to its hiring decision and that it legitimately may ascertain.” (*Id.* at p. 883, fn. 15, 59 Cal.Rptr.2d 696, 927 P.2d 1200.) We determined the employer’s interest was legitimate “[i]n light of the well-documented problems that are associated with the abuse of drugs and alcohol by employees—increased absenteeism, diminished productivity, greater health costs, increased safety problems and potential liability to third parties, and more frequent turnover....” (*Id.* at p. 882, 59 Cal.Rptr.2d 696, 927 P.2d 1200, fn. omitted.) We also noted that the plaintiff in that case had “cite[d] no authority indicating that an employer may not reject a job applicant if it lawfully discovers that the applicant currently is using illegal drugs or engaging in excessive consumption of alcohol.” *****388** (*Id.* at p. 883, fn. 15, 59 Cal.Rptr.2d 696, 927 P.2d 1200.) The employer’s legitimate concern about the use of illegal drugs also led us in *Loder* to reject the claim that preemployment drug testing violated job applicants’ state constitutional right to privacy. (*Id.* at pp. 887–898, 59 Cal.Rptr.2d 696, 927 P.2d 1200; see Cal. Const., art. I, § 1.) In so holding we relied in part on *Wilkinson v. Times Mirror Corp.* (1989) 215 Cal.App.3d 1034, 1046–1053, 264 Cal.Rptr. 194, in which the Court of Appeal had earlier reached the same conclusion. (*Loder, supra,* at pp. 888–889, 59 Cal.Rptr.2d 696, 927 P.2d 1200.)

[2] While the decision in *Loder, supra,* 14 Cal.4th 846, 59 Cal.Rptr.2d 696, 927 P.2d 1200, took the form of a lead opinion signed by two justices, five justices concurred in the lead opinion's conclusions concerning preemployment drug testing. (See *id.* at p. 853, fn. 1, 59 Cal.Rptr.2d 696, 927 P.2d 1200.)

The Compassionate Use Act (Health & Saf.Code, § 11362.5) does not eliminate marijuana's potential for abuse or the employer's legitimate interest in whether an employee uses the drug. Marijuana, as noted, remains illegal under federal law because of its "high potential for abuse," its lack of any "currently accepted medical use in treatment in the United States," and its "lack of accepted safety for use ... under medical supervision." (21 U.S.C. § 812(b)(1); see *Gonzales v. Raich, supra,* 545 U.S. 1, 14, 125 S.Ct. 2195, 162 L.Ed.2d 1.) Although California's voters had no power to change federal law, certainly they were free to disagree with Congress's assessment of marijuana, and they also were free to view the possibility of beneficial medical use as a sufficient basis for exempting from criminal liability under state law patients whose physicians recommend the drug. The logic of this position, however, did not compel the voters to take the additional step of requiring employers to accommodate ***928** marijuana use by their employees. The voters were entitled to change the criminal law without also speaking to employment law.

The operative provisions of the Compassionate Use Act (Health & Saf.Code, § 11362.5) do not speak to employment law. Except in their treatment of physicians, who are protected not only from "punish[ment]" but also from being "denied any right or privilege ... for having recommended marijuana" (*id.,* subd. (c)), the act's operative provisions speak exclusively to the criminal law. Subdivision (d) of section 11362.5 provides that "[s]ection 11357, relating to the possession of marijuana, and [s]ection 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician." Subdivision (e) of section 11362.5 simply defines "primary caregiver." The operative provisions do not mention employment law.

Neither is employment law mentioned in the findings and declarations (Health & Saf.Code, § 11362.5, subd. (b)(1)(A)-(C) & (2)) that precede the Compassionate Use Act's operative provisions. In those introductory provisions, the voters declared their intent "[t]o ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes" under the conditions stated in the act (*id.,* subd. (b)(1)(A)), to ensure that medical users of marijuana and their primary caregivers "are not subject to criminal prosecution or sanction" (*id.,* subd. (b)(1)(B)), and "[t]o encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana" (*id.,* subd. (b)(1)(C)). In a final introductory provision, the voters declared that "[n]othing in this section [i.e., the Compassionate Use Act] shall be construed ****206** to supersede legislation prohibiting persons from engaging in conduct that endangers others, nor to condone the diversion of marijuana for nonmedical purposes." (*Id.,* subd. (b)(2).)

*****389** Plaintiff would read the first of these findings and declarations (Health & Saf.Code, § 11362.5, subd. (b)(1)(A)) as if it created a broad right to use marijuana without hindrance or inconvenience, enforceable against private parties such as employers. The provision states in full: "The people of the State of California hereby find and declare that the purposes of the Compassionate Use Act of 1996 are as follows: [¶] (A) To ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief." Not to require employers to accommodate marijuana use, plaintiff contends, "would eviscerate the right ***929** promised to the seriously ill by the California electorate." To the contrary, the only "right" to obtain and use marijuana created by the Compassionate Use Act is the right of "a patient, or ... a patient's primary caregiver, [to] possess[ ] or cultivate[ ] marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician" without thereby becoming subject to punishment under sections 11357 and 11358 of the Health and Safety Code. (*Id.,* § 11362.5, subd. (d).) An employer's refusal to accommodate an employee's use of marijuana does not affect, let alone eviscerate, the immunity to criminal liability provided in the act. We thus give full effect to the limited "right to obtain and use marijuana" (*id.,* subd. (b)(1)(A)) granted in the act (*id.,* subd. (d)) by enforcing it according to its terms.

The proponents of the Compassionate Use Act (Health & Saf.Code, § 11362.5) consistently described the proposed measure to the voters as motivated by the desire to create

a narrow exception to the criminal law.[3] The proponents spoke, for example, of their desire to "protect patients from criminal penalties for marijuana" (Ballot Pamp., Gen. Elec. (Nov. 5, 1996) argument in favor of Prop. 215, p. 60) and not to "send cancer patients to jail for using marijuana" (*id.*, rebuttal to argument against Prop. 215, p. 61). Although the measure's *opponents* argued the act would "make it legal for people to smoke marijuana in the workplace ... or in public places ... next to your children" (*id.*, rebuttal to argument in favor of Prop. 215, p. 60), the argument was obviously disingenuous because the measure did not purport to change the laws affecting public intoxication with controlled substances (Pen.Code, § 647, subd. (f)) or the laws addressing controlled substances in such places as schools and parks (Health & Saf.Code, §§ 11353.5, 11353.7), and the act expressly provided that it did "not supersede legislation prohibiting persons from engaging in conduct that endangers others" (*id.*, § 11362.5, subd. (b)(2)). Proponents reasonably countered the argument by observing that, under the measure, "[p]olice officers can still arrest anyone for marijuana offenses. Proposition 215 simply *****390** gives those arrested a defense in court, *if they can prove they used marijuana with a doctor's approval.*" (Ballot Pamp., *supra*, rebuttal to argument against Prop. 215, p. 61.)[4]

[3] The voters did not give medical users of marijuana complete immunity from state criminal law. For example, the act left medical users subject to laws prohibiting marijuana's transportation (Health & Saf.Code, § 11360), sale (*ibid.*) and possession for sale (*id.*, § 11359). Legislation enacted after this case arose created additional narrow medical exceptions to those statutes. (*Id.*, § 11362.765, added by Stats.2003, ch. 875, § 2.) Even while broadening immunity in some respects, however, the Legislature prohibited possession by medical users of large quantities of marijuana. (*Id.*, § 11362.77, subd. (a).)

[4] The Legislature subsequently provided medical users of marijuana and their primary caregivers limited immunity from arrest for possessing, transporting, delivering and cultivating the drug. (Health & Saf.Code, § 11362.71, subd. (e), added by Stats.2003, ch. 875, § 2.)

***930** In conclusion, given the Compassionate Use Act's modest objectives and the manner in which it was presented to the voters for ****207** adoption, we have no reason to conclude the voters intended to speak so broadly, and in a context so far removed from the criminal law, as to require employers to accommodate marijuana use. As another court has observed, "the proponents' ballot arguments reveal a delicate tightrope walk designed to induce voter approval, which we would upset were we to stretch the proposition's limited immunity to cover that which its language does not." (*People v. Galambos* (2002) 104 Cal.App.4th 1147, 1152, 128 Cal.Rptr.2d 844.)

[6] Arguing against this conclusion, plaintiff notes that " ' "[the] power of the initiative must be liberally construed ... to promote the democratic process." ' " (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 219, 149 Cal.Rptr. 239, 583 P.2d 1281, quoting *San Diego Bldg. Contractors Assn. v. City Council* (1974) 13 Cal.3d 205, 210, fn. 3, 118 Cal.Rptr. 146, 529 P.2d 570.) There is no question, however, that the voters had the power to change state law concerning marijuana in any respect they wished. Thus, the question before us is not whether the voters had the power to change employment law, but whether they actually intended to do so. As we have explained, there is no reason to believe they did. For a court to construe an initiative statute to have substantial unintended consequences strengthens neither the initiative power nor the democratic process; the initiative power is strongest when courts give effect to the voters' formally expressed intent, without speculating about how they might have felt concerning subjects on which they were not asked to vote. As plaintiff notes, "[t]he judiciary's traditional role of interpreting ambiguous statutory language or 'filling in the gaps' of statutory schemes is, of course, as applicable to initiative measures as it is to measures adopted by the Legislature." (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1202, 246 Cal.Rptr. 629, 753 P.2d 585.) We detect, however, no relevant ambiguity in the Compassionate Use Act, which simply does not speak to employment law. In any event, our power to resolve ambiguities in statutory language is only a tool for achieving the ultimate goal of statutory interpretation, which is to effectuate the enactors' intent.

Finally, plaintiff contends that legislation enacted after the Compassionate Use Act (Health & Saf.Code, § 11362.5) requires employers to accommodate employees' use of medical marijuana at home. Plaintiff attempts to find such a rule in Health and Safety Code section 11362.785, subdivision (a) (added by Stats.2003, ch. 875, § 2), which took effect more than two years after defendant terminated plaintiff's employment. The statute provides as follows: "Nothing in this article shall require any accommodation of any medical use of marijuana on the property or premises of any place of employment or during the hours of employment or on the property or premises of any jail, correctional facility, or other type of penal institution in which prisoners ***931** reside or persons

under arrest ***391 are detained." (Health & Saf.Code, § 11362.785, subd. (a).) Plaintiff would read this language as if it articulated express exceptions to a general requirement of accommodation that appears only implicitly. Plaintiff's interpretation might be plausible if the failure to infer a requirement of accommodation would render the statute meaningless, but such is not the case. Even without inferring a requirement of accommodation, the statute can be given literal effect as negating any expectation that the immunity to criminal liability for possessing marijuana granted in the Compassionate Use Act gives medical users a civilly enforceable right to possess the drug at work or in custody.

In any event, given the controversy that would inevitably have attended a legislative proposal to require employers to accommodate marijuana use, we do not believe that Health and Safety Code section 11362.785, subdivision (a), can reasonably be understood as adopting such a requirement silently and without debate.

[7] Arguing to the contrary as amici curiae, five present and former state legislators who authored the bill adding section 11362.785 to the Health and Safety Code state they "believed that this statutory enactment clearly and sufficiently expressed [their] belief that the FEHA *does* require employers generally to accommodate off-duty, off-premises medical cannabis use by **208 their employees, absent an undue hardship." Amici curiae do not assert, however, that they shared their view of the proposed legislation with the Legislature as a whole. We therefore have no basis for imputing the authors' views to the whole Legislature. " 'In construing a statute we do not consider the motives or understandings of individual legislators who cast their votes in favor of it. [Citations.] Nor do we carve an exception to this principle simply because the legislator whose motives are proffered actually authored the bill in controversy [citation]; no guarantee can issue that those who supported his proposal shared his view of its compass.' " (*California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 699–700, 170 Cal.Rptr. 817, 621 P.2d 856, quoting *In re Marriage of Bouquet* (1976) 16 Cal.3d 583, 589–590, 128 Cal.Rptr. 427, 546 P.2d 1371.)

We thus conclude that plaintiff cannot state a cause of action under the FEHA based on defendant's refusal to accommodate his use of marijuana.

B. Wrongful Termination in Violation of Public Policy

[8] [9] [10] Plaintiff also attempts, based on defendant's refusal to accommodate his use of marijuana, to state a cause of action for wrongful termination in violation of public policy. The legal principles that underlie such a claim are well established: Either party to a contract of employment without a specified *932 term may terminate the contract at will (Lab.Code, § 2922), but this ordinary rule is subject to the exception that an employer may not discharge an employee for a reason that violates a fundamental public policy of the state. (*Stevenson v. Superior Court, supra*, 16 Cal.4th 880, 887, 66 Cal.Rptr.2d 888, 941 P.2d 1157; *Tameny v. Atlantic Richfield Co., supra*, 27 Cal.3d 167, 170, 176–178, 164 Cal.Rptr. 839, 610 P.2d 1330.) To support such a cause of action, the policy in question must satisfy four requirements: "First, the policy must be supported by either constitutional or statutory provisions. Second, the policy must be 'public' in the sense that it 'inures to the benefit of the public' rather than serving merely the interests of the individual. Third, the policy must have been articulated at the time of the discharge. Fourth, the policy must be 'fundamental' and 'substantial.' " (*Stevenson* ***392 *v. Superior Court, supra*, 16 Cal.4th 880, 889–890, 66 Cal.Rptr.2d 888, 941 P.2d 1157, fn. omitted.)

Defendant contends his discharge violated fundamental public policies supported by the Compassionate Use Act (Health & Saf.Code, § 11362.5), the FEHA (Gov.Code, § 12900 et seq.), and the privacy clause of the California Constitution (Cal. Const., art. I, § 1). We disagree.

[11] The Compassionate Use Act (Health & Saf.Code, § 11362.5), as we have explained, simply does not speak to employment law. Nothing in the act's text or history indicates the voters intended to articulate any policy concerning marijuana in the employment context, let alone a fundamental public policy requiring employers to accommodate marijuana use by employees. Because the act articulates no such policy, to read the FEHA in light of the Compassionate Use Act leads to no different result. Plaintiff argues that the statutory provision on which a wrongful termination claim is based "does not have to ... prohibit the employer's precise act...." (*Grinzi v. San Diego Hospice Corp.* (2004) 120 Cal.App.4th 72, 80–81, 14 Cal.Rptr.3d 893.) Even so, the provision in question still " 'must sufficiently describe the type of prohibited conduct to enable an employer to know the fundamental public policies that are expressed in that law' " (*id.* at p. 80, 14 Cal.Rptr.3d 893, quoting *Sequoia Ins. Co. v. Superior Court* (1993) 13 Cal.App.4th 1472, 1480, 16 Cal.Rptr.2d 888; see *Turner v. Anheuser–Busch, Inc.* (1994) 7 Cal.4th 1238, 1256, fn. 9, 32 Cal.Rptr.2d 223, 876 P.2d 1022) and to " 'have adequate notice of the conduct that will subject [the employer] to tort liability to

the employees [it] discharge[s]' " (*Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 79, 78 Cal.Rptr.2d 16, 960 P.2d 1046, quoting *Stevenson v. Superior Court, supra*, 16 Cal.4th 880, 889, 66 Cal.Rptr.2d 888, 941 P.2d 1157). The Compassionate Use Act did not put defendant on notice that employers would ****209** thereafter be required under the FEHA to accommodate the use of marijuana.

[12] Plaintiff also argues that his discharge violated the public policy that underlies an adult patient's right "to determine whether or not to submit to lawful medical treatment" ***933** (*Cobbs v. Grant* (1972) 8 Cal.3d 229, 242, 104 Cal.Rptr. 505, 502 P.2d 1)—a right we have located both in the privacy clause of the state Constitution (art. I, § 1) and in the common law. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 531–532, 110 Cal.Rptr.2d 412, 28 P.3d 151.) The body of law to which plaintiff refers protects the right of competent adult patients to refuse medical treatment (*id.* at p. 531, 110 Cal.Rptr.2d 412, 28 P.3d 151) and imposes, inferentially, an obligation on health care providers to seek patients' informed consent before undertaking medical procedures (*ibid.*). Defendant's decision not to accommodate plaintiff's marijuana use does not implicate plaintiff's right to refuse medical treatment.

In the course of this argument, plaintiff attempts to describe a right of medical self-determination broader than the right to refuse treatment we recognized in *Conservatorship of Wendland, supra*, 26 Cal.4th 519, 531–532, 110 Cal.Rptr.2d 412, 28 P.3d 151, and in *Cobbs v. Grant, supra*, 8 Cal.3d 229, 242, 104 Cal.Rptr. 505, 502 P.2d 1. Plaintiff relies on *Abigail Alliance v. von Eschenbach* (D.C.Cir.2006) 445 F.3d 470, 486, in which a federal court held that a terminally ill patient with no other government-approved treatment options had a due process right under the United States Constitution to have access to an investigational new drug that the Food and Drug Administration had not approved for commercial sale but had determined to be *****393** sufficiently safe for testing on human beings. Analogizing to *Abigail Alliance*, plaintiff argues that "[i]n California, medical marijuana use is legal, so under the state [C]onstitution RagingWire was not permitted to prohibit [plaintiff] from using it." Assuming for the sake of argument *Abigail Alliance* has any relevance to the case before us, the decision does not compel a different result because defendant has not prevented plaintiff from having access to marijuana. Defendant has only refused to employ plaintiff. To assert that defendant's refusal to employ plaintiff affects his access to marijuana is merely to restate the argument that the Compassionate Use Act (Health & Saf.Code, § 11362.5) gives plaintiff a right to use marijuana free of hindrance or inconvenience, enforceable against third parties. That argument we have already rejected. (See *ante*, 70 Cal.Rptr.3d at p. 388–89, 174 P.3d at p. 205–06.)

We thus conclude plaintiff cannot state a cause of action for wrongful termination in violation of public policy.

III. DISPOSITION

The judgment of the Court of Appeal is affirmed.

WE CONCUR: GEORGE, C.J., and BAXTER, CHIN, and CORRIGAN, JJ.

KENNARD, J., concurring and dissenting.

Under this state's Compassionate Use Act of 1996 (Health & Saf.Code § 11362.5; hereafter the Compassionate Use Act), doctor-recommended marijuana use as a medical treatment ***934** is "not subject to criminal prosecution or sanction." (Health & Saf.Code, § 11362.5, subd. (b)(1)(B).) In a decision conspicuously lacking in compassion, however, the majority holds that an employer may fire an employee for such marijuana use, even when it occurs during off-duty hours, does not affect the employee's job performance, does not impair the employer's legitimate business interests, and provides the only effective relief for the employee's chronic pain and muscle spasms. I disagree.

The majority's holding disrespects the will of California's voters who, when they enacted the Compassionate Use Act, surely never intended that persons who availed themselves of its provisions would thereby disqualify themselves from employment. Moreover, as I will explain, unless an employer can demonstrate that an employee's doctor-approved use of marijuana under the Compassionate Use Act while off duty and away from the jobsite is likely to impair the employer's business operations in some way, or that the employer has offered another reasonable and effective form of accommodation, the employer's discharge of the employee is ****210** disability discrimination prohibited by the state Fair Employment and Housing Act (Gov.Code, § 12900 et seq.; hereafter the FEHA).

I agree with the majority, however, that because federal law prohibits marijuana possession (21 U.S.C. §§ 812, 844(a)), discharging an employee for off-duty,

physician-recommended marijuana use will not support a claim of wrongful discharge in violation of public policy (see *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 164 Cal.Rptr. 839, 610 P.2d 1330).

I

As a result of injuries he sustained in January 1983 during his service with the United States Air Force, plaintiff Gary Ross suffers from a lower back strain and muscle spasms. In September 1999, after muscle relaxants and conventional medications had failed to provide relief from the pain and muscle spasms, and on his doctor's recommendation, plaintiff began *****394** using marijuana as a medication for his back problems.

In September 2001, plaintiff accepted a job with defendant RagingWire Telecommunications, Inc. (RagingWire) as a lead systems analyst. Since beginning treatment with marijuana, plaintiff had held similar employment, and his disability and marijuana use had not impaired his job performance. After hiring plaintiff, RagingWire required him to take a drug test. Plaintiff gave the clinic administering the test a copy of his doctor's written recommendation to use marijuana in accordance with the state Compassionate Use Act.

***935** Not surprisingly, plaintiff's test results were positive for tetrahydrocannabinol, the active chemical in marijuana. Plaintiff presented his doctor's marijuana recommendation to RagingWire's human resources director, explaining that he used marijuana to treat his chronic back pain in accordance with the state Compassionate Use Act. Nevertheless, without offering any other form of accommodation for his back condition, RagingWire discharged plaintiff because of his at-home, doctor-recommended marijuana use.

Plaintiff sued RagingWire for disability discrimination in violation of the FEHA, breach of contract, and wrongful discharge in violation of public policy. The trial court sustained RagingWire's demurrer without leave to amend and dismissed plaintiff's complaint, and the Court of Appeal affirmed.

II

In November 1996, the California electorate enacted Proposition 215, an initiative measure entitled "Medical Use of Marijuana." Proposition 215 added section 11362.5 to the Health and Safety Code. That section provides:

"(a) This section shall be known and may be cited as the Compassionate Use Act of 1996.

"(b)(1) The people of the State of California hereby find and declare that the purposes of the Compassionate Use Act of 1996 are as follows:

"(A) To ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief.

"(B) To ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction.

"(C) To encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana.

"(2) Nothing in this section shall be construed to supersede legislation prohibiting persons from engaging in conduct that endangers others, nor to condone the diversion of marijuana for nonmedical purposes.

***936** "(c) Notwithstanding any other provision of law, no physician in this state shall be punished, or denied any right or privilege, ****211** for having recommended marijuana to a patient for medical purposes.

"(d) Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses *****395** or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician.

"(e) For the purposes of this section, 'primary caregiver' means the individual designated by the person exempted under this section who has consistently assumed responsibility for the housing, health, or safety of that person." (Health & Saf.Code, § 11362.5.)

Although the Compassionate Use Act was the first law of its kind in the nation, at least nine states now have similar laws.[1] (See *Gonzales v. Raich* (2005) 545 U.S. 1, 5, fn. 1, 125 S.Ct. 2195, 162 L.Ed.2d 1.) In two other states, Florida and Idaho, appellate court decisions have recognized a medical necessity defense for persons charged with illegal marijuana possession or cultivation. (*Sowell v. State* (Fla.Dist.Ct.App.1998) 738 So.2d 333, 334; *State v. Hastings* (1990) 118 Idaho 854, 801 P.2d 563, 565.)

[1] State and federal laws permitting marijuana use for medical purposes have existed at various times and in various forms, however, for many decades. (See *Leary v. United States* (1969) 395 U.S. 6, 16–18 & fn. 19, 89 S.Ct. 1532, 23 L.Ed.2d 57; Note, *Last Resorts and Fundamental Rights: The Substantive Due Process Implications of Prohibitions on Medical Marijuana* (2005) 118 Harv. L.Rev.1985, 1997–1998.)

Courts must construe statutes to effectuate the purpose of the law. (*Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1087, 29 Cal.Rptr.3d 234, 112 P.3d 623.) As explained by the statute's words quoted above, the purpose of the Compassionate Use Act is to allow California residents to use marijuana, when a doctor recommends it, to treat medical conditions, including chronic pain, without being subject "to criminal prosecution *or sanction*." (Health & Saf.Code, § 11362.5, subd. (b)(1)(B), italics added.) The majority's construction defeats, rather than effectuates, that purpose. The majority renders illusory the law's promise that responsible use of marijuana as a medical treatment will be free of sanction. The majority allows employers to impose the sanction of job termination on those employees who use marijuana under the statute's provisions. The majority's decision leaves many Californians with serious illnesses just two options: continue receiving the benefits of marijuana use "in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or [ ] other illness" (***937** Health & Saf.Code, § 11362.5, subd. (b)(1)(A)) and become unemployed, giving up what may be their only source of income, or continue in their employment, discontinue marijuana treatment, and try to endure their chronic pain or other condition for which marijuana may provide the only relief. Surely this cruel choice is not what California voters intended when they enacted the state Compassionate Use Act.

Nor is this cruel choice something that the FEHA permits. One of the FEHA's stated purposes is "to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgement on account of ... physical disability ... [or] medical condition...." (Gov.Code, § 12920.) The FEHA recognizes that "the practice of denying employment opportunity ... [on account of physical disability or medical condition] deprives the state of the fullest utilization of its capacities for development and advancement, and substantially and adversely affects the interest of employees, employers, and the public in general." (*Ibid.*) Under the FEHA, it is an unlawful employment practice "[f]or an employer ... to fail to make reasonable *****396** accommodation for the known physical or mental disability of an applicant or employee" (*id.*, § 12940, subd. (m)) or "to fail to engage in a timely, good faith, interactive process with [an] employee or applicant to determine effective reasonable accommodations" (*id.*, § 12940, subd. (n)). The FEHA directs that its provisions are to be construed ****212** liberally to accomplish each of its purposes. (*Id.*, § 12993, subd. (a).)

The majority says that the FEHA requires the employer to make only "reasonable accommodation" for an employee's disability (Gov.Code, § 12940, subd. (m)), and that accepting an employee's physician-approved, off-duty marijuana use for medical treatment is not a "reasonable accommodation" because federal law prohibits marijuana possession (21 U.S.C. §§ 812, 844(a)). I disagree.

The FEHA sets forth an illustrative list of measures that may constitute reasonable accommodation, including (1) "[m]aking existing facilities used by employees readily accessible to, and useable by, individuals with disabilities," and (2) "[j]ob restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, *adjustment or modification of* examinations, training materials or *policies*, [and] the provision of qualified readers or interpreters...." (Gov.Code, § 12926, subd. (n)(1) & (2), italics added.) Thus, the accommodations that the FEHA requires may include adjustment or modification of an employer's policy, such as a policy concerning employee drug use.

***938** Nothing in the text of the FEHA or in California decisional law supports the proposition that a requested accommodation can never be deemed reasonable if it involves off-duty conduct by the employee away from the jobsite that is criminal under federal law, even though that same conduct is expressly protected from criminal sanction under state law. Rather, under the FEHA, determining whether an employee-proposed accommodation is reasonable requires consideration of its

benefits to the employee (including its effectiveness in meeting the employee's disability-related needs and enabling the employee to competently perform the essential job functions), the burdens it would impose on the employer and other employees, and the availability of suitable and effective alternative forms of accommodation. (See *US Airways, Inc. v. Barnett* (2002) 535 U.S. 391, 403–404, 122 S.Ct. 1516, 152 L.Ed.2d 589 [proposed accommodation not reasonable because it would conflict with seniority rights of other employees]; *Oconomowoc Residential Prog. v. City of Milwaukee* (7th Cir.2002) 300 F.3d 775, 784 ["Whether a requested accommodation is reasonable or not is a highly fact-specific inquiry and requires balancing the needs of the parties."]; *Alley v. Charleston Area Medical Center, Inc.* (2004) 216 W.Va. 63, 602 S.E.2d 506, 516 [" 'reasonable accommodation means reasonable modifications or adjustments to be determined on a case-by-case basis which are designed as attempts to enable an individual with a disability to be hired or to remain in the position for which he or she was hired' "].)

The FEHA does not require an employer to make any accommodation that the employer can demonstrate would impose an "undue hardship" on the operation of its business. (Gov.Code, § 12940, subd. (m).) The FEHA defines an "[u]ndue hardship" as "an action requiring significant difficulty or expense, when considered in light of the following factors: [¶] (1) The nature and cost of the accommodation needed. [¶] (2) The overall financial resources of the facilities involved in the provision of the reasonable accommodations, the number of persons employed at *****397** the facility, and the effect on expenses and resources or the impact otherwise of these accommodations upon the operation of the facility. [¶] (3) The overall financial resources of the covered entity, the overall size of the business of a covered entity with respect to the number of employees, and the number, type, and location of its facilities. [¶] (4) The type of operations, including the composition, structure, and functions of the workforce of the entity. [¶] (5) The geographic separateness, administrative, or fiscal relationship of the facility or facilities." (*id.,* § 12926, subd. (s).)

Here, plaintiff's complaint alleges in substance that marijuana use is essential to provide him relief from the chronic pain and muscle spasms of his disabling back condition, that more conventional medications have not provided similar relief, and that effective treatment is necessary for him to work productively. RagingWire has not argued that plaintiff's requested ***939** accommodation would interfere with the rights or interests of its other employees. Accordingly, the reasonableness of the proposed accommodation ****213** of allowing plaintiff to use marijuana at home, as an exception to RagingWire's normal drug-screening policies, turns on *how it would affect RagingWire's legitimate interests as an employer* and, more specifically, whether it would impose an "undue hardship"—defined as "an action requiring significant difficulty or expense"—on the operation of the RagingWire's business. (Gov.Code, §§ 12940, subd. (m), 12926, subd. (s); see *Bagatti v. Department of Rehabilitation* (2002) 97 Cal.App.4th 344, 356, 118 Cal.Rptr.2d 443.) To establish that plaintiff's proposed accommodation was unreasonable, therefore, RagingWire must show that, because marijuana possession is illegal under federal law, an employee's off-duty and offsite use of marijuana would adversely affect its business operations.

RagingWire cites the state Drug–Free Workplace Act of 1990 (Gov.Code, § 8350 et seq.) as demonstrating that employers are not required to tolerate marijuana use by their employees. Under that legislation, persons or organizations that provide property or services to any state agency are required to certify that they will "provide a drug-free workplace" (*id.,* § 8355), which is defined as "a site ... at which employees of the entity are prohibited from engaging in the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance" (*id.,* § 8351, subd. (a)). The term "controlled substance" is defined to include any substance, like marijuana, listed in schedule I of the federal Controlled Substances Act (21 U.S.C. § 812). (Gov.Code, § 8351, subd. (c).) Under federal law, federal grant recipients are subject to a similar drug-free workplace requirement. (41 U.S.C. § 702.)

RagingWire argues that, under these state and federal laws, tolerating plaintiff's doctor-approved marijuana use would jeopardize its ability to contract with state agencies or to obtain federal grants. Both the state and federal drug-free workplace laws are concerned only with conduct *at the jobsite,* however. RagingWire argues that an employee who ingested marijuana at home but remained under its influence at work might be viewed as "using" marijuana at work. But plaintiff has not sought an accommodation that would allow him to possess or be under the influence of marijuana at work. The drug-free workplace laws are not concerned with employees' possession or use of drugs like marijuana away from the jobsite, and nothing in those laws would prevent an employer that knowingly accepted an employee's use of marijuana as a medical treatment at the employee's home from obtaining drug-free workplace certification.

*****398** Because this case arises on demurrer, RagingWire

has presented no evidence to substantiate its claim that accommodating plaintiff's doctor-recommended use of marijuana would necessarily or likely have substantial ***940** adverse effects on its business operations. In the absence of such evidence, there is no basis for the majority to conclude that accommodating plaintiff's doctor-approved marijuana use would be unreasonable within the meaning of the FEHA. Therefore, plaintiff's complaint states a cause of action under California's FEHA.

The majority appears to rely in part on *Loder v. City of Glendale* (1997) 14 Cal.4th 846, 59 Cal.Rptr.2d 696, 927 P.2d 1200 (*Loder*). There, the City of Glendale had adopted a drug testing program under which all job applicants who had conditionally been offered employment and all existing employees who had been approved for promotion to new positions were required to undergo urinalysis testing for a variety of illegal drugs. (*Id.* at pp. 852–853, 59 Cal.Rptr.2d 696, 927 P.2d 1200 (lead opn. of George, C.J.).) If the test revealed "the presence of drugs *for which the applicant* [had] *no legitimate medical explanation,* the applicant [was] disqualified for hiring or promotion...." (*Id.* at p. 856, 59 Cal.Rptr.2d 696, 927 P.2d 1200, italics added.) A taxpayer sued to enjoin further expenditure of public funds for the drug testing program, arguing that the program violated, among other things, the state Constitution's guarantee of the right of privacy. (*Ibid.*) The trial court concluded that, as to both job applicants and current employees seeking promotion, the program was valid for some job classifications but not others, and it issued an injunction prohibiting use of the drug testing program for the job categories as to which it had found the program impermissible. ****214** (*Id.* at pp. 857–858, 59 Cal.Rptr.2d 696, 927 P.2d 1200.)

In *Loder,* a majority of this court acknowledged that an employer has a legitimate interest in determining whether job applicants and employees are *abusing* drugs, because drug *abuse* is commonly associated with increased absenteeism, diminished productivity, greater health costs, increased safety problems, potential liability to third parties, and more frequent turnover. (*Loder, supra,* 14 Cal.4th at pp. 882–883, 897, 59 Cal.Rptr.2d 696, 927 P.2d 1200 (lead opn. of George, C.J.); *id.* at pp. 927–928, 59 Cal.Rptr.2d 696, 927 P.2d 1200 (conc. & dis. opn. of Chin, J.).) "[A]n employer generally need not resort to suspicionless drug testing to determine whether a *current employee* is likely to be absent from work or less productive or effective as a result of current drug or alcohol abuse: an employer can observe the employee at work, evaluate his or her work product and safety record, and check employment records to determine whether the employee has been excessively absent or late." (*Id.* at p. 883, 59 Cal.Rptr.2d 696, 927 P.2d 1200 (lead opn. of George, C.J.), italics added; see *id.* at p. 919, 59 Cal.Rptr.2d 696, 927 P.2d 1200 (conc. & dis. opn. of Kennard, J.).) For a *job applicant,* however, "an employer has not had a similar opportunity to observe the applicant over a period of time" and "reasonably may lack total confidence in the reliability of information supplied by a former employer or other references." (*Id.* at p. 883, 59 Cal.Rptr.2d 696, 927 P.2d 1200 (lead opn. of George, C.J.).) Although the employer could observe the employee after hiring, "the hiring of a new employee frequently represents a considerable investment on the part of an employer" and "once an applicant is hired, any attempt by the ***941** employer to dismiss the employee generally will entail additional expenses...." (*Ibid.* (lead opn. of George, C.J.); see *****399** *id.* at pp. 927–928, 59 Cal.Rptr.2d 696, 927 P.2d 1200 (conc. & dis. opn. of Chin, J.).) Thus, "[t]he employer's interest is a significant one, not only because the mistaken hiring of an individual who is abusing drugs or alcohol can impose significant financial burdens on an employer, but also because such an employee's absences or diminished production frequently will create morale problems within the workplace." (*Id.* at pp. 897–898, 59 Cal.Rptr.2d 696, 927 P.2d 1200 (lead opn. of George, C.J.).)

A necessary implication of this reasoning is that *in the absence of a legitimate medical explanation,* test results showing a job applicant's drug use are generally a sufficient basis to deny employment. (See *Loder, supra,* 14 Cal.4th at p. 883, fn. 15, 59 Cal.Rptr.2d 696, 927 P.2d 1200 (lead opn. of George, C.J.); *Pilkington Barnes Hind v. Superior Court* (1998) 66 Cal.App.4th 28, 34, 77 Cal.Rptr.2d 596.) Another necessary implication of *Loder's* reasoning is that the likely impacts on the employer's business operations—in the form of increased absenteeism, diminished productivity, greater health costs, increased safety problems, potential liability to third parties, and more frequent turnover—provide the appropriate yardstick for measuring the employer's legitimate interests in this context.

Loder is not directly relevant here because plaintiff is not challenging RagingWire's right to conduct preemployment drug testing, and because the program at issue in *Loder* sought to detect the presence of drugs "for which the applicant [had] no legitimate medical explanation" (*Loder, supra,* 14 Cal.4th at p. 856, 59 Cal.Rptr.2d 696, 927 P.2d 1200 (lead opn. of George, C.J.)). By contrast, plaintiff uses marijuana as a doctor-recommended treatment under the state Compassionate Use Act for a disabling physical condition. No evidence before this court establishes that

use of a controlled substance under a doctor's recommendation poses the same risks of excessive absences and diminished productivity that a majority of this court relied on in *Loder* to uphold a drug testing program.

Considered strictly in terms of its physical effects relevant to employee productivity and safety, and not its legal status, marijuana does not differ significantly from many prescription drugs—for example, hydrocodone (Vicodin), hydromorphone (Dilaudid), oxycodone (OxyContin), methylphenidate (Ritalin), methadone (Dolophine), and diazepam (Valium)—that may affect cognitive functioning and have a potential for abuse. The medical ****215** use of any such drug poses some risks of absenteeism and impaired productivity. Indeed, many nonprescription medications taken for the common cold, seasonal allergies, and similar minor afflictions frequently have side effects, such as drowsiness or dizziness, that may impair productivity. The majority does not deny that the FEHA may require an employer to accommodate a disabled ***942** employee's doctor-approved medical use of other substances that potentially could impair job performance.

I conclude, for these reasons, that plaintiff's complaint states a cause of action for disability discrimination under California's FEHA.

III

In *Tameny v. Atlantic Richfield Co., supra*, 27 Cal.3d 167, 164 Cal.Rptr. 839, 610 P.2d 1330, this court held that "when an employer's discharge of an employee violates fundamental principles of public policy, the discharged employee may maintain a tort action and recover damages traditionally available in such actions." (*Id.* at p. 170, 164 Cal.Rptr. 839, 610 P.2d 1330.) That holding was based on the propositions that "an employer does not *****400** enjoy an absolute or totally unfettered right to discharge even an at-will employee," and that "an employer's traditional broad authority to discharge an at-will employee 'may be limited by statute ... or by considerations of public policy.' " (*Id.* at p. 172, 164 Cal.Rptr. 839, 610 P.2d 1330.)

To support a claim for wrongful termination in violation of public policy, a policy must be "delineated in either constitutional or statutory provisions"; it must be " 'public' in the sense that it 'inures to the benefit of the public' rather than serving merely the interests of the individual"; it must have been well-established "at the time of the discharge"; and it must be "fundamental" and "substantial." (*Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 894, 66 Cal.Rptr.2d 888, 941 P.2d 1157.) Here, to support his wrongful discharge claim, plaintiff relies on the public policies delineated in California's FEHA and Compassionate Use Act.

The policies delineated in the Compassionate Use Act will not support plaintiff's common law wrongful discharge claim. Although the aim of that initiative measure was to give qualified patients a right to use marijuana as treatment for illness without being subject to criminal prosecution or sanction (Health & Saf.Code, § 11362.5, subd. (b)(1)(A)-(B)), the measure implicitly recognized that achieving that goal fully would require the cooperation of the federal government; to this end, the measure included as another of its purposes "[t]o encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana" (*id.*, § 11362.5, subd. (b)(1)(C)). To date, however, that goal has not been achieved, and simple possession of marijuana remains a crime under federal law, with no medical necessity exception or defense. (*United States v. Oakland Cannabis Buyers' Cooperative* (2001) 532 U.S. 483, 486, 494, 121 S.Ct. 1711, 149 L.Ed.2d 722.) That being so, qualified patients cannot be said to *fully* enjoy a right under state law to use marijuana as a medical treatment, nor can the state's ***943** policy be deemed sufficiently fundamental and substantial to support a common law wrongful discharge claim.

Nor can plaintiff support his claim by the policies delineated in the FEHA or other laws prohibiting discrimination against the disabled. As a general rule, the public policy against disability discrimination, articulated in the FEHA and other statutes, inures to the public's benefit and is sufficiently substantial and fundamental to support a cause of action for wrongful discharge in violation of public policy. (*City of Moorpark v. Superior Court* (1998) 18 Cal.4th 1143, 1159–1161, 77 Cal.Rptr.2d 445, 959 P.2d 752.) In the particular context of accommodating an employee's physician-approved use of marijuana to treat a disabling medical condition, however, that policy must be viewed against the backdrop of both federal criminal laws, which prohibit marijuana possession without a medical use exception, and the federal Americans with Disabilities Act, which excludes from its protection "any employee or applicant who is currently engag[ed] in the illegal use of drugs, when the covered entity acts on the ****216** basis of such use" (42 U.S.C. § 12114 (a)). A state law policy that rests on a proposition that Congress and federal law have rejected—here the proposition that marijuana has

acceptable uses for medical treatment—cannot be considered sufficiently substantial and fundamental to support a common law tort claim for wrongful discharge.

Because plaintiff has not identified a policy that is sufficiently fundamental and substantial to support his wrongful discharge claim, I agree that the trial court *****401** did not err in sustaining RagingWire's demurrer to that claim.

IV

California voters enacted the Compassionate Use Act to allow marijuana to be used for medical treatment on a doctor's recommendation. Although there have been well-publicized abuses of the law for financial gain or personal gratification, the Legislature has acted to curb those abuses while still allowing marijuana to be available for those with genuine medical need. (See, e.g., Health & Saf.Code, §§ 11362.7–11362.9, added by Stats.2003, ch. 875.) By its decision today, however, the majority has seriously compromised the Compassionate Use Act, denying to those who must work for a living its promised benefits "in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or ... other illness" (Health & Saf.Code, § 11362.5, subd. (b)(1)(A)). The majority gives employers permission to fire any employee who uses marijuana on a doctor's recommendation, without requiring the employer to show that this medical use will in any way impair the employer's business interests. Absent such a showing of business impairment, I would hold that neither the Compassionate ***944** Use Act nor the FEHA allows an employer to fire an employee for offsite and off-duty, doctor-recommended marijuana use as a medical treatment.

I would reverse the Court of Appeal's judgment.

I CONCUR: MORENO, J.

All Citations

42 Cal.4th 920, 174 P.3d 200, 70 Cal.Rptr.3d 382, 155 Lab.Cas. P 60,553, 20 A.D. Cases 223, 36 NDLR P 88, 08 Cal. Daily Op. Serv. 1098, 2008 Daily Journal D.A.R. 1217, 57 A.L.R.6th 727

End of Document

495 Mich. 1
Supreme Court of Michigan.

TER BEEK

v.

CITY OF WYOMING.

Docket No. 145816.
|
Calendar No. 8.
|
Argued Oct. 10, 2013.
|
Decided Feb. 6, 2014.

Synopsis

Background: Property owner who was a qualified medical marijuana patient under Michigan Medical Marihuana Act (MMMA) filed action against city, challenging city zoning ordinance prohibiting use of land in a manner that was contrary to federal law, including federal controlled substances act (CSA), which prohibited any and all uses of marijuana. The Circuit Court, Kent County, Dennis B. Leiber, J., entered summary disposition in city's favor based on determination that CSA preempted MMMA. Owner appealed. The Court of Appeals, 297 Mich.App. 446, 823 N.W.2d 864, reversed and remanded. City sought leave to appeal.

Holdings: The Supreme Court, McCormack, J., held that:

[1] MMMA was not preempted by CSA, and

[2] city ordinance penalizing qualifying patients for engaging in MMMA-compliant medical marijuana use was preempted by MMMA to the extent of the conflict.

Affirmed and remanded.

Attorneys and Law Firms

****533** Daniel S. Korobkin, Michael J. Steinberg, Kary L. Moss, Michael O. Nelson, Grand Rapids and Miriam J. Aukerman for John Ter Beek.

Sluiter, Van Gessel & Carlson, PC, Wyoming, (by Jack R. Sluiter) for the City of Wyoming.

Gerald A. Fisher for the Public Corporation Law Section of the State Bar of Michigan.

Christopher J. Forsyth for the Prosecuting Attorneys Association of Michigan.

Cunningham Dalman, PC, Holland, (by Andrew J. Mulder and Vincent L. Duckworth) for the Michigan Municipal League.

Donald L. Knapp, Jr. Corporation Counsel, and Michael E. Fisher, Assistant Corporation Counsel, for the city of Livonia.

McLellan Law Offices, Lansing, (by Richard McLellan) for the Cato Institute, the Drug Policy Alliance, and Law Enforcement Against Prohibition.

Denise A. Pollicella, Esq., PLLC (by Denise Pollicella, Farmington Hills) for Cannabis Attorneys of Michigan.

Opinion

McCORMACK, J.

***5** The Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq.*, enacted pursuant to a voter initiative in November 2008, affords certain protections under state law for the medical use of marijuana in the state of Michigan. Among them is ****534** § 4(a) of the MMMA, which immunizes registered qualifying patients from "penalty in any manner" for specified MMMA-compliant medical marijuana use. MCL 333.26424(a). At issue here is the relationship between this immunity, the federal prohibition of marijuana under the controlled substances act (CSA), 21 USC 801 *et seq.*, and a local zoning ordinance adopted by the city of Wyoming which prohibits and subjects to civil sanction any land "[u]ses that are contrary to federal law." City of Wyoming Code of Ordinances, § 90–66. As set forth below, we agree with the Court of Appeals that the ordinance directly conflicts with, and is preempted by, § 4(a) of the MMMA, and that § 4(a) is not preempted by the federal CSA. Accordingly, we affirm the Court of Appeals' judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 2010, approximately two years after the MMMA went into effect, defendant, the city of Wyoming (the ***6** City), adopted an ordinance (the Ordinance) amending the zoning chapter of the Wyoming city code to add the following provision:

> Uses not expressly permitted under this article are prohibited in all districts. Uses that are contrary to federal law, state law or local ordinance are prohibited.

City of Wyoming Code of Ordinances, § 90–66. Under the city code, violations of the Ordinance constitute municipal civil infractions punishable by "civil sanctions, including, without limitation, fines, damages, expenses and costs," City of Wyoming Code of Ordinances, § 1–27(a) to (b), and are also subject to injunctive relief, City of Wyoming Code of Ordinances, § 1–27(g).

Plaintiff, John Ter Beek, lives in the City and is a qualifying patient under the MMMA who possesses a state-issued registry identification card.[1] Upon the City's adoption of the Ordinance, Ter Beek filed the instant lawsuit in circuit court. Ter Beek alleges that he wishes to grow, possess, and use medical marijuana in his home in accordance with the MMMA. The Ordinance, however, by its incorporation of the CSA's federal prohibition of marijuana, prohibits and penalizes such conduct. This, Ter Beek contends, impermissibly contravenes § 4(a) of the MMMA, which provides that registered qualifying patients "shall not be subject to arrest, prosecution, or penalty in any manner ... for the medical use of marihuana in accordance with" the MMMA. Accordingly, Ter Beek seeks a declaratory judgment that the Ordinance is preempted by the MMMA and a corresponding injunction prohibiting the City ***7** from enforcing the Ordinance against him for the medical use of marijuana in compliance with the MMMA.[2]

1 The MMMA specifies the circumstances under which a person can register with the state as a qualifying medical marijuana patient. Upon satisfaction of these criteria, the state issues a registry identification card to the qualifying patient. See MCL 333.26426.

2 Ter Beek has not been charged with violating the Ordinance or subjected to any enforcement action in connection with it. The City unsuccessfully challenged his standing before the circuit court, and has abandoned that challenge on appeal.

The parties filed cross-motions for summary disposition pursuant to MCR 2.116(C)(10), disputing whether the Ordinance is preempted by the MMMA and whether the MMMA is preempted by the CSA. The circuit court granted summary disposition in favor of the City, concluding that the MMMA is preempted by the CSA. Ter Beek appealed by right in the Court of Appeals, which reversed the circuit court's ****535** grant of summary disposition in favor of the City and remanded the case for entry of summary disposition in favor of Ter Beek. *Ter Beek v. Wyoming*, 297 Mich.App. 446, 823 N.W.2d 864 (2012). The Court of Appeals first concluded that the Ordinance directly conflicts with, and is thus preempted by, § 4(a) of the MMMA, because it purports to penalize the medical use of marijuana in contravention of § 4(a)'s grant of immunity from such penalties. The Court of Appeals then concluded that § 4(a) is not preempted by the federal CSA, reasoning that it is possible to comply with both statutes simultaneously and that § 4(a)'s state-law immunity for certain medical marijuana patients does not stand as an obstacle to the CSA's federal regulation of marijuana use or to the federal enforcement of same. The City sought leave to appeal, which we granted, to address the questions of state and federal preemption. *Ter Beek v. Wyoming*, 493 Mich. 957, 828 N.W.2d 381 (2013).[3]

3 We also granted permission for interested persons or groups to move to submit briefs amicus curiae. The City of Livonia, the Michigan Municipal League, the Prosecuting Attorneys Association of Michigan, and the State Bar of Michigan Public Corporation Law Section submitted briefs in support of the City; the Cannabis Attorneys of Mid–Michigan, and the Cato Institute, the Drug Policy Alliance, and Law Enforcement Against Prohibition submitted briefs in support of Ter Beek.

***8** II. STANDARD OF REVIEW

[1] [2] Whether § 4(a) of the MMMA preempts the Ordinance, and whether the CSA preempts § 4(a), are questions of law which we review de novo. *Detroit v. Ambassador Bridge Co.*, 481 Mich. 29, 35, 748 N.W.2d 221 (2008); *Mich. Coalition For Responsible Gun Owners v. City of Ferndale*, 256 Mich.App. 401, 405, 662 N.W.2d 864 (2003). We also review de novo the decision to grant or deny summary disposition, *Spiek v. Dep't of Transp.*, 456 Mich. 331, 337, 572 N.W.2d 201 (1998), and review for clear error factual findings in support of that decision, *Ambassador Bridge*, 481 Mich. at 35, 748

N.W.2d 221.

[3] [4] [5] As we have recently explained, the intent of the electors governs the interpretation of voter-initiated statutes such as the MMMA, just as the intent of the Legislature governs the interpretation of legislatively enacted statutes. *People v. Bylsma*, 493 Mich. 17, 26, 825 N.W.2d 543 (2012). The first step when interpreting a statute is to examine its plain language, which provides the most reliable evidence of intent. If the statutory language is unambiguous, no further judicial construction is required or permitted because we must conclude that the electors intended the meaning clearly expressed. *Id.*

III. ANALYSIS

A. KEY PROVISIONS OF THE MMMA, THE CSA, AND THE ORDINANCE

The questions of state and federal preemption in this case arise from the differing treatment of medical ***9** marijuana use under the MMMA and the CSA. As noted, § 4(a) of the MMMA provides, in relevant part:

> A qualifying patient who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of marihuana in accordance with this act.... [MCL 333.26424(a).]

****536** The MMMA defines "medical use" as "the acquisition, possession, cultivation, manufacture, use, internal possession, delivery, transfer, or transportation of marihuana or paraphernalia relating to the administration of marihuana to treat or alleviate a registered qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition." MCL 333.26423(f).

The CSA, meanwhile, contains no such immunity. Rather, it makes it "unlawful for any person knowingly or intentionally ... to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." 21 USC 841(a)(1). The CSA classifies marijuana as a Schedule I controlled substance, 21 USC 812(c)(c)(10), and thus largely prohibits its manufacture, distribution, or possession.[4]

[4] The only exception to this prohibition is for research projects approved by the federal government. See 21 USC 823(f); *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 490, 121 S.Ct. 1711, 149 L.Ed.2d 722 (2001).

The parties do not dispute that the Ordinance, by prohibiting all "[u]ses that are contrary to federal law," incorporates the CSA's prohibition of marijuana and makes certain violations of that prohibition both punishable ***10** by civil sanctions and subject to injunctive relief. Thus, an individual whose medical use of marijuana falls within the scope of § 4(a)'s immunity from "penalty in any manner" may nonetheless be subject to punishment under the Ordinance for that use.

B. THE CSA DOES NOT PREEMPT § 4(a) OF THE MMMA

As noted, the circuit court rejected Ter Beek's challenge to the Ordinance because it held that § 4(a) of the MMMA is preempted by the CSA. The Court of Appeals disagreed. Although raised under the particular circumstances of this case as a defense, we address this question first, and hold that the CSA does not preempt § 4(a).

[6] [7] Federal preemption of state law is grounded in the Supremacy Clause of the United States Constitution, U.S. Const., art. VI, cl. 2, which "invalidates state laws that 'interfere with, or are contrary to,' federal law." *Hillsborough Co. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 712, 105 S.Ct. 2371, 85 L.Ed.2d 714 (1985), quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211, 6 L.Ed. 23 (1824). When a state law is preempted by federal law, the state law is "without effect." *Maryland v. Louisiana*, 451 U.S. 725, 746, 101 S.Ct. 2114, 68 L.Ed.2d 576 (1981).

[8] [9] [10] [11] " '[T]he purpose of Congress is the ultimate touchstone in every pre-emption case.' " *Wyeth v. Levine*, 555 U.S. 555, 565, 129 S.Ct. 1187, 173 L.Ed.2d 51 (2009), quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996). Furthermore, "[i]n all pre-emption cases, and particularly in those in which Congress has legislated ... in a field

which the States have traditionally occupied, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." ***11** *Wyeth*, 555 U.S. at 565, 129 S.Ct. 1187 (citations and quotation marks omitted). See also *Maryland*, 451 U.S. at 746, 101 S.Ct. 2114 ("Consideration under the Supremacy Clause starts with the basic presumption that Congress did not intend to displace state law."). The areas of public health and safety are among those traditionally left to the states. *Gonzales v. Oregon*, 546 U.S. 243, 270, 126 S.Ct. 904, 163 L.Ed.2d 748 (2006). If the federal statute contains a clause expressly addressing preemption, ****537** "we 'focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent.' " *Chamber of Commerce v. Whiting*, 563 U.S. ——, ——, 131 S.Ct. 1968, 1977, 179 L.Ed.2d 1031 (2011), quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993). Where such a clause is ambiguous, and the federal statute at issue pertains to an area of traditional state regulation, we "have a duty to accept the reading [of the clause] that disfavors pre-emption." *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449, 125 S.Ct. 1788, 161 L.Ed.2d 687 (2005). Tie, in that case, goes to the state.

[12] With those principles in mind, we look to the CSA, which expressly provides:

> No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together. [21 USC 903.]

Accordingly, in assessing whether § 4(a) of the MMMA is preempted by the CSA, the relevant inquiry is whether there is a "positive conflict" between the two statutes such that they "cannot consistently stand together."

***12** Such a conflict can arise when it is impossible to comply with both federal and state requirements, *Mut. Pharm. Co., Inc. v. Bartlett*, 570 U.S. ——, ——, 133 S.Ct. 2466, 2473, 186 L.Ed.2d 607 (2013), or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, *Hillsborough*, 471 U.S. at 713, 105 S.Ct. 2371. See also *Wyeth*, 555 U.S. at 567–581, 129 S.Ct. 1187 (applying this preemption standard to a federal statute providing that it did not preempt state law unless there was a "direct and positive conflict" between it and state law). We find neither such conflict here.

[13] First, we do not find it impossible to comply with both the CSA and § 4(a) of the MMMA. "Impossibility pre-emption is a demanding defense," *Wyeth*, 555 U.S. at 573, 129 S.Ct. 1187, and requires more than "[t]he existence of a hypothetical or potential conflict," *Rice v. Norman Williams Co.*, 458 U.S. 654, 659, 102 S.Ct. 3294, 73 L.Ed.2d 1042 (1982). Such impossibility results when state law requires what federal law forbids, or vice versa. See, e.g., *Mut. Pharm.*, 570 U.S. at ——, 133 S.Ct at 2476–2477; *PLIVA, Inc. v. Mensing*, 564 U.S. ——, ——, 131 S.Ct. 2567, 2577–2578, 180 L.Ed.2d 580 (2011); *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 873, 120 S.Ct. 1913, 146 L.Ed.2d 914 (2000); *Barnett Bank of Marion Co., NA v. Nelson*, 517 U.S. 25, 31, 116 S.Ct. 1103, 134 L.Ed.2d 237 (1996).

[14] The CSA criminalizes marijuana, making its manufacture, distribution, or possession a punishable offense under federal law. Section 4(a) of the MMMA does not require anyone to commit that offense, however, nor does it prohibit punishment of that offense under federal law. Rather, the MMMA is clear that, if certain individuals choose to engage in MMMA-compliant medical marijuana use, § 4(a) provides them with a ***13** limited *state-law* immunity from "arrest, prosecution, or penalty in any manner"—an immunity that does not purport to prohibit federal criminalization of, or punishment for, that conduct. See MCL 333.26427(a) ("The medical use of marihuana is allowed under state law to the extent that it is carried out in accordance with the provisions of this act."); ****538** see also MCL 333.26422 (noting that "approximately 99 out of every 100 marihuana arrests in the United States are made under state law, rather than under federal law," that "changing state law will have the practical effect of protecting from arrest the vast majority of seriously ill people who have a medical need to use marihuana," and that "[a]lthough federal law currently prohibits any use of marihuana except under very limited circumstances, states are not required to enforce federal law or prosecute people for engaging in activities prohibited by federal law"). Nor, of course, could the MMMA prohibit such federal regulation and enforcement. See *United States v. Hicks*, 722 F.Supp.2d 829, 833 (E.D.Mich.2010) ("It is indisputable that state medical-marijuana laws do not, and cannot,

supercede federal laws that criminalize the possession of marijuana."), citing, *inter alia*, *Gonzales v. Raich*, 545 U.S. 1, 29, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005).[5]

[5] The City contends that these cases, as well as *Oakland Cannabis*, 532 U.S. 483, 121 S.Ct. 1711, support a finding of federal preemption in this case. These cases, however, indicate that state medical marijuana laws cannot be used to inhibit federal enforcement of the CSA; none of them suggests that such laws cannot exempt from penalty under state law certain conduct that remains illegal under federal law. See *Raich*, 545 U.S. at 15–33, 125 S.Ct. 2195 (holding that the federal government had constitutional authority to prohibit and prosecute under federal law the cultivation of marijuana, regardless of whether such activity violated state law); *Oakland Cannabis*, 532 U.S. at 486–495, 121 S.Ct. 1711 (holding that, in a federal prosecution under the CSA, there was no medical necessity defense available under federal law, regardless of whether that defense would be available under state law); *Hicks*, 722 F.Supp.2d at 832–834 (holding that the federal defendant's compliance with the MMMA did not excuse his violation of the conditions of his federal supervised release). This line of authority thus fully comports with our holding here.

[15] ***14** The City objects that § 4(a) forces it, as well as the state of Michigan and every other municipality therein, to "ignore" the CSA. But that is not the precise question. While, as discussed at greater length below, § 4(a) does prevent the City from fully incorporating the CSA's prohibition of marijuana into its own local enforcement scheme, it does not require that the City violate that federal prohibition. Neither does the CSA require that the City, or the state of Michigan, enforce that prohibition. In fact, it is well established that, " '[e]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the states to require or prohibit those acts.' " *Printz v. United States*, 521 U.S. 898, 924, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997), quoting *New York v. United States*, 505 U.S. 144, 166, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992). We do not find it impossible to comply with both the CSA and § 4(a) of the MMMA.

[16] **[17]** We likewise hold that § 4(a) does not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of the CSA. *Hillsborough*, 471 U.S. at 713, 105 S.Ct. 2371. A state law presents such an obstacle to a federal law " '[i]f the purpose of the [federal law] cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect.' " *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373, 120 S.Ct. 2288, 147 L.Ed.2d 352 (2000), quoting *Savage v. Jones*, 225 U.S. 501, 533, 32 S.Ct. 715, 56 L.Ed. 1182 (1912). As the United States Supreme Court has stated, "[w]hat is a sufficient obstacle is a matter of judgment," to be assessed under ***15** the circumstances ****539** of the given case and "to be informed by examining the federal statute as a whole and identifying its purpose and intended effects." *Crosby*, 530 U.S. at 373, 120 S.Ct. 2288.

[18] According to the Supreme Court in *Raich*, "[t]he main objectives of the CSA were to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances." 545 U.S. at 12, 125 S.Ct. 2195. "To effectuate these goals, Congress devised a closed regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA." *Id.* at 13, 125 S.Ct. 2195. As noted, in devising that scheme, Congress categorized marijuana as a Schedule I controlled substance, thereby designating it "as contraband for *any* purpose" and indicating that it "has no acceptable medical uses." *Id.* at 27, 125 S.Ct. 2195.

Michigan also designates marijuana as a Schedule 1 drug, and its possession, manufacture, and delivery remain punishable offenses under Michigan law. *People v. Kolanek*, 491 Mich. 382, 394, 817 N.W.2d 528 (2012). See also MCL 333.7212(1)(c), MCL 333.7401(2)(d), and MCL 333.7403(2)(d). In enacting the MMMA, however, the people of the State of Michigan chose to part ways with Congress only regarding the scope of acceptable medical use of marijuana, allowing "a limited class of individuals" to engage in certain such use in "an 'effort for the health and welfare of [Michigan] citizens.' " *Kolanek*, 491 Mich. at 393–394, 817 N.W.2d 528, quoting MCL 333.26422(c).

While the MMMA and CSA differ with respect to medical use of marijuana, § 4(a)'s limited state-law immunity for such use does not frustrate the CSA's operation nor refuse its provisions their natural effect, such that its purpose cannot otherwise be accomplished. ***16** *Crosby*, 530 U.S. at 373, 120 S.Ct. 2288. As the Court of Appeals duly recognized and the MMMA itself makes clear, see MCL 333.26422 and MCL 333.26427(a), this immunity does not purport to alter the CSA's federal criminalization of marijuana, or to interfere with or undermine federal enforcement of that prohibition. The CSA, meanwhile, by expressly declining to occupy the field of regulating marijuana, 21 USC 903, "explicitly contemplates a role for the States" in that regard, *Oregon*, 546 U.S. at 251, 126 S.Ct. 904, and there

is no indication that the CSA's purpose or objective was to require states to enforce its prohibitions. Indeed, as noted, Congress lacks the constitutional authority to impose such an obligation. As a result, we fail to see how § 4(a) creates, as the City claims, "significant and unsolvable obstacles to the enforcement of the" CSA, such that the former is preempted by the latter.

In reaching the opposite conclusion, both the City and the circuit court rely heavily on *Mich. Canners & Freezers Ass'n v. Agricultural Marketing & Bargaining Bd.*, 467 U.S. 461, 104 S.Ct. 2518, 81 L.Ed.2d 399 (1984), and *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 348 Or. 159, 230 P.3d 518 (2010). Such reliance, however, is misplaced. At issue in *Michigan Canners* was whether Michigan's Agricultural Marketing and Bargaining Act (the Michigan Act) was preempted by the federal Agricultural Fair Practices Act (AFPA). In order to protect individual producers of agricultural commodities from coercion by associations of producers, the AFPA prohibited those associations from "engag[ing] in practices that interfere with a producer's freedom to choose whether to bring his products to market himself or to sell them through" an association. *Mich. Canners*, 467 U.S. at 464, 104 S.Ct. 2518. The Michigan Act, ****540** however, provided that, under certain circumstances, a producers' association could ***17** receive state accreditation to become the exclusive bargaining agent for all producers of a given commodity; when an association was so accredited, "all producers of that commodity, regardless of whether they have chosen to become members of the association, must pay a service fee to the association and must abide by the terms of the contracts the association negotiates with processors." *Id.* at 467–468, 104 S.Ct. 2518. The United States Supreme Court concluded that the Michigan Act was preempted by the AFPA because the Michigan Act, by compelling individual producers to effectively join and be bound by the actions of accredited associations, "empowers producers' associations to do precisely what the federal Act forbids them to do" and "imposes on the producer the same incidents of association membership with which Congress was concerned in enacting" the AFPA. *Id.* at 478, 104 S.Ct. 2518. In other words, the AFPA guaranteed individual producers the freedom to choose whether to join associations; the Michigan Act, however, denied them that right.

Such circumstances are not present here. Section 4(a) simply provides that, under state law, certain individuals may engage in certain medical marijuana use without risk of penalty. As previously discussed, while such use is prohibited under federal law, § 4(a) does not deny the federal government the ability to enforce that prohibition, nor does it purport to require, authorize, or excuse its violation. Granting Ter Beek his requested relief does not limit his potential exposure to federal enforcement of the CSA against him, but only recognizes that he is immune under state law for MMMA-compliant conduct, as provided in § 4(a). Unlike in *Michigan Canners*, the state law here does not frustrate or impede the federal mandate.

Emerald Steel is also distinguishable, never mind nonbinding. At issue in that case was whether the ***18** plaintiff's medical use of marijuana constituted an "illegal use of drugs" under a state statutory provision governing his claim for employment discrimination. The statute, in turn, provided that "illegal use of drugs" did not include "uses authorized under the [CSA] or under other provisions of state or federal law." *Emerald Steel*, 348 Or. at 170, 230 P.3d 518, quoting Or Rev. Stat. 659A.122(2). The plaintiff argued that his medical marijuana use was not an "illegal use of drugs" under the statute because it was authorized under the Oregon Medical Marijuana Act, which provided that certain individuals, under certain circumstances, "may engage in ... the medical use of marijuana." Or Rev. Stat. 475.306(1). The Oregon Supreme Court rejected this position, concluding that, to the extent the Oregon Medical Marijuana Act authorized the use of marijuana, it was preempted by the CSA. *Emerald Steel*, 348 Or. at 190, 230 P.3d 518. The decision made clear, however, that it did "not hold that the [CSA] preempts provisions of the Oregon Medical Marijuana Act that exempt the possession, manufacture, or distribution of medical marijuana from state criminal liability." *Id.* See also, e.g., *id.* at 171–172, 230 P.3d 518 nn. 11 and 12. Thus, *Emerald Steel* addresses a substantively different question than the one presently before us—whether the CSA preempts § 4(a)'s limited state-law immunity from penalty for certain medical marijuana use—and we see nothing in its answer that would alter our own.[6]

6 Furthermore, we have misgivings, mildly put, about *Emerald Steel's* reasoning. In particular, in finding preemption, the Oregon Supreme Court characterized *Michigan Canners* as a case of "state law permit[ting] what federal law prohibits," and reasoned by analogy that "[a]ffirmatively authorizing a use that federal law prohibits stands as an obstacle to the implementation and execution of the full purposes and objectives of the" CSA. *Emerald Steel*, 348 Or. at 177–178, 230 P.3d 518. *Michigan Canners*, however, does not stand for the broad proposition that, if a state law permits something a federal law prohibits, it is preempted. Instead, *Michigan Canners* involved a state law that not only permitted what federal law prohibited, but also required that certain federal guarantees be denied. Indeed, the Oregon Supreme Court has since moderated

this aspect of its analysis, clarifying that "*Emerald Steel* should not be construed as announcing a stand-alone rule that any state law that can be viewed as 'affirmatively authorizing' what federal law prohibits is preempted." *Willis v. Winters*, 350 Or. 299, 310 n. 6, 253 P.3d 1058 (2011).

****541 *19** In sum, there is no "positive conflict" between the CSA and § 4(a) of the MMMA such that the two "cannot consistently stand together," 21 USC 903: it is not impossible to comply with both the CSA's federal prohibition of marijuana and § 4(a)'s limited state-law immunity for certain medical marijuana use, and § 4(a) does not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of the CSA. *Mut. Pharm.*, 570 U.S. at ——, ——, 133 S.Ct. at 2473, 2476–2477; *Hillsborough*, 471 U.S. at 713, 105 S.Ct. 2371. As such, the CSA does not preempt § 4(a) of the MMMA.

C. THE ORDINANCE IS PREEMPTED BY § 4(a) OF THE MMMA

[19] Having found that the CSA does not preempt § 4(a) of the MMMA, we turn next to whether the Ordinance, as applied to Ter Beek, is preempted by § 4(a). We agree with the Court of Appeals that it is. The required analysis on this point is not complex.

[20] [21] Under the Michigan Constitution, the City's "power to adopt resolutions and ordinances relating to its municipal concerns" is "subject to the constitution and the law." Const. 1963, art. 7, § 22. As this Court has previously noted, "[w]hile prescribing broad powers, this provision specifically provides that ordinances are subject to the laws of this state, i.e., statutes." *AFSCME v. Detroit*, 468 Mich. 388, 410, 662 N.W.2d 695 (2003). The City, therefore, "is precluded from enacting an ordinance if ... the ordinance is in direct conflict with the state statutory scheme, or ... if the state statutory ***20** scheme preempts the ordinance by occupying the field of regulation which the municipality seeks to enter, to the exclusion of the ordinance, even where there is no direct conflict between the two schemes of regulation." *People v. Llewellyn*, 401 Mich. 314, 322, 257 N.W.2d 902 (1977) (footnotes omitted). A direct conflict exists when "the ordinance permits what the statute prohibits or the ordinance prohibits what the statute permits." *Id.* at 322 n. 4, 257 N.W.2d 902. Here, the Ordinance directly conflicts with the MMMA by permitting what the MMMA expressly prohibits—the imposition of a "penalty in any manner" on a registered qualifying patient whose medical use of marijuana falls within the scope of § 4(a)'s immunity.

The City disputes this characterization of the Ordinance, noting that while it permits the imposition of civil sanctions, it does not require them; instead, a violation of the Ordinance can be enforced through equitable relief such as a civil injunction. We agree with the Court of Appeals, however, that enjoining a registered qualifying patient from engaging in MMMA-compliant conduct unambiguously falls within the scope of penalties prohibited by § 4(a). For § 4(a) makes clear that individuals who satisfy the statutorily specified criteria "shall not be subject to ... penalty in any manner," a prohibition which expressly ****542** includes "civil penalt[ies]." As the Court of Appeals noted, the MMMA does not define "penalty," but that term is commonly understood to mean a "punishment imposed or incurred for a violation of law or rule ... something forfeited." *Random House Webster's College Dictionary* (2000). See, e.g., *People v. Morey*, 461 Mich. 325, 330, 603 N.W.2d 250 (1999) ("Where, as here, the Legislature has not expressly defined terms used within a statute, we may turn to dictionary definitions to aid our goal of construing those terms in accordance with their ordinary and generally accepted meanings."). Under the ***21** Ordinance, individuals are subject to civil punishment for engaging in the medical use of marijuana in accordance with the MMMA; by the plain terms of § 4(a), the manner of that punishment—be it requiring the payment of a monetary sanction, or denying the ability to engage in MMMA-compliant conduct—is not material to the MMMA's immunity from it.

Nor do we agree with the City that our decision in *Michigan v. McQueen*, 493 Mich. 135, 828 N.W.2d 644 (2013), mandates a different outcome. In *McQueen*, this Court held that, because the defendants' business, a medical marijuana dispensary, was not being operated in accordance with the MMMA, it was properly enjoined as a public nuisance under MCL 600.3801.[7] *McQueen*, 493 Mich. at 140, 828 N.W.2d 644. The City contends that, because the growth and cultivation of marijuana is a violation of the Ordinance, and violations of zoning ordinances constitute nuisances per se under the Michigan Zoning Enabling Act (MZEA), MCL 125.3407, *McQueen* permits the City's regulation through injunction. *McQueen*, however, affirmed the injunction of the defendants' business not simply because it was a nuisance, but because it was a nuisance that fell outside the scope of conduct permitted under the MMMA. *McQueen* does not, as the City contends, authorize a municipality to enjoin a registered qualifying patient from

engaging in medical use of marijuana in compliance with the MMMA, simply by characterizing that conduct as a zoning violation.

[7] MCL 600.3801(1)(c) provides that "[a] building, vehicle, boat, aircraft, or place is a nuisance if ... [i]t is used for the unlawful manufacture, transporting, sale, keeping for sale, bartering, or furnishing of a controlled substance."

[22] Furthermore, contrary to the City's suggestion, the fact that the Ordinance is a local zoning regulation enacted ***22** pursuant to the MZEA does not save it from preemption. The City stresses that the MZEA affords local municipalities a broad grant of authority to use their zoning powers to advance local interests, such as "public health, safety, and welfare." MCL 125.3201. The MMMA, however, provides in no uncertain terms that "[t]he medical use of marihuana is allowed under state law to the extent that it is carried out in accordance with" the MMMA, MCL 333.26427(a), and that "[a]ll other acts and parts of acts inconsistent with [the MMMA] do not apply to the medical use of marihuana," MCL 333.26427(e). The City contends that the MMMA does not express a sufficiently clear intent to supersede the MZEA, but we see no ambiguity in the MMMA's plain language to this effect. See *Bylsma*, 493 Mich. at 26, 825 N.W.2d 543 (explaining that the MMMA's plain language provides the most reliable evidence of intent and that if this language is unambiguous, no further judicial construction is required or permitted because we must conclude that the electors intended the meaning clearly expressed). It is well accepted that when two legislative enactments seemingly conflict, the specific provision prevails over the more general ****543** provision. See, e.g., *Crane v. Reeder*, 22 Mich. 322, 334 (1871). Accordingly, the City cannot look to the MZEA to authorize or excuse the Ordinance's contravention of the specific immunity for medical marijuana use provided under § 4(a) of the MMMA.[8]

[8] No more availing is the City's attempt to import certain zoning-related standards into our preemption analysis. The City, for instance, points to *Kyser v. Kasson Twp.*, 486 Mich. 514, 521, 786 N.W.2d 543 (2010), which states that, when a citizen challenges a zoning ordinance on due process grounds, the "ordinance is presumed to be reasonable." The City also cites the MZEA's exclusionary zoning provision, MCL 125.3207, which requires a showing of "demonstrated need" for a certain land use in order to overcome a zoning ordinance's "effect of totally prohibiting the establishment of a land use within a local unit of government"—a need, the City contends, that Ter Beek cannot show, since he can likely procure marijuana for medical use in other municipalities. We do not see how these standards impact our assessment of whether the Ordinance is preempted by the state-law immunity from penalty provided by § 4(a) of the MMMA. The City seems to suggest that, for this immunity to attach, a registered qualifying patient must show a "demonstrated need" under MCL 125.3207 for his or her MMMA-compliant medical marijuana use. Neither § 4(a) nor any other provision of the MMMA, however, imposes or betrays a tolerance for such a condition with respect to the availability of its protections. Thus, to the extent the MZEA may be read to require such a showing for an individual to claim the immunity provided under § 4(a), it is inconsistent with and superseded by the MMMA. MCL 333.26427(e).

***23** The City also points to *Riverside v. Inland Empire Patients Health & Wellness Ctr., Inc.*, 56 Cal.4th 729, 156 Cal.Rptr.3d 409, 300 P.3d 494 (2013), in support of its position. In that case, the California Supreme Court found certain state medical marijuana laws did not preempt a local zoning ordinance. *Riverside*, however, is beside the point. At issue there was whether a local zoning ordinance prohibiting medical marijuana dispensaries within city limits was preempted by California's Compassionate Use Act (CUA) and Medical Marijuana Program Act (MMP). The California Supreme Court concluded that there was no preemption, as the CUA and MMP offered only a limited immunity from sanction under certain specified state criminal and nuisance statutes, thereby "signal[ing] that the *state* declines to regard the described acts as nuisances or criminal violations, and that the *state's* enforcement mechanisms will thus not be available against these acts." *Id.* at 762, 156 Cal.Rptr.3d 409, 300 P.3d 494. As such, these "limited provisions" were found to "neither expressly or impliedly restrict or preempt the authority of individual local jurisdictions to choose otherwise for local reasons, and to prohibit collective or cooperative medical marijuana activities within their own borders." *Id.* The scope of § 4(a)'s immunity, however, is not similarly circumscribed; in prohibiting certain individuals from being "subject ***24** to ... penalty in any manner," § 4(a) draws no distinction between state and local laws or penalties. We thus do not find *Riverside's* reasoning instructive.

[23] Lastly, the City stresses that the MMMA does not create an absolute right to grow and distribute marijuana. Correct. See *People v. Kolanek*, 491 Mich. 382, 394, 817 N.W.2d 528 (2012) ("The MMMA does *not* create a general right for individuals to use and possess marijuana in Michigan. Possession, manufacture, and delivery of marijuana remain punishable offenses under Michigan

law."); *Bylsma*, 493 Mich. at 32, 825 N.W.2d 543 (discussing *Kolanek*); *People v. Koon*, 494 Mich. 1, 5, 832 N.W.2d 724 (2013) ("The MMMA, rather than legalizing marijuana, functions by providing registered patients with immunity ****544** from prosecution for the medical use of marijuana."). Ter Beek, however, does not seek to assert any such general or absolute right. Nor does our conclusion recognize one. The Ordinance directly conflicts with the MMMA not because it generally pertains to marijuana, but because it permits registered qualifying patients, such as Ter Beek, to be penalized by the City for engaging in MMMA-compliant medical marijuana use. Section 4(a) of the MMMA expressly prohibits this. As such, the MMMA preempts the Ordinance to the extent of this conflict.[9]

[9] Contrary to the City's concern, this outcome does not "create a situation in the State of Michigan where a person, caregiver or a group of caregivers would be able to operate with no local regulation of their cultivation and distribution of marijuana." Ter Beek does not argue, and we do not hold, that the MMMA forecloses all local regulation of marijuana; nor does this case require us to reach whether and to what extent the MMMA might occupy the field of medical marijuana regulation.

IV. CONCLUSION

For the foregoing reasons, we hold that the Ordinance is preempted by § 4(a) of the Michigan Medical ***25** Marijuana Act, which in turn is not preempted by the federal controlled substances act. Accordingly, we affirm the judgment of the Court of Appeals, reverse the circuit court's grant of summary disposition in favor of the City, and remand for entry of summary disposition in favor of Ter Beek.

YOUNG, C.J., and MICHAEL F. CAVANAGH, MARKMAN, MARY BETH KELLY, ZAHRA and VIVIANO, JJ., concurred with MCCORMACK, J.

All Citations

495 Mich. 1, 846 N.W.2d 531

331 P.3d 975
Court of Appeals of New Mexico.

Gregory VIALPANDO, Worker–Appellee,
v.
BEN'S AUTOMOTIVE SERVICES and Redwood Fire & Casualty, Employer/Insurer–Appellants.

No. 32,920.
|
May 19, 2014.
|
Certiorari Denied, July 25, 2014, No. 34,766.

Synopsis

Background: Employer appealed from order of the Workers' Compensation Administration, Terry Kramer, Workers' Compensation Judge (WCJ), requiring employer to reimburse claimant for medical marijuana use.

Holdings: The Court of Appeals, Wechsler, J., held that:

[1] Workers' Compensation Act authorizes reimbursement for medical marijuana, and

[2] order did not require employer to commit a federal crime.

Affirmed.

Attorneys and Law Firms

***976** Peter D. White, Santa Fe, NM, for Appellee.

French & Associates, P.C., Lisa T. Mack, Albuquerque, NM, for Appellants.

OPINION

WECHSLER, Judge.

{ 1} We consider in this appeal whether, under the Workers' Compensation Act (the Act), NMSA 1978, §§ 52–1–1 to –70 (1929, as amended through 2013), an employer and insurer must reimburse an injured worker for medical marijuana used pursuant to the Lynn and Erin Compassionate Use Act (Compassionate Use Act), NMSA 1978, §§ 26–2B–1 to –7 (2007). The workers' compensation judge (WCJ) found that Worker Gregory Vialpando was qualified to participate in the State of New Mexico Department of Health Medical Cannabis Program authorized by the Compassionate Use Act and that such treatment would be reasonable and necessary medical care. The WCJ ordered Worker to pay for medical marijuana through the program and Employer and Insurer Ben's Automotive Services and Redwood Fire & Casualty (collectively, Employer) to reimburse Worker. Employer appeals, arguing that (1) the WCJ erred because his order is illegal and unenforceable under federal law and also thereby contrary to public policy, and (2) the Act and regulations promulgated pursuant thereto do not recognize reimbursement for medical marijuana. Because we agree with the WCJ that the Act authorizes reimbursement for medical marijuana, we affirm.

BACKGROUND

{ 2} In the course of, and arising out of, his employment with Employer, Worker sustained a low back injury on June 9, 2000 that resulted in his undergoing numerous surgical procedures. In a stipulated compensation order entered August 22, 2008, the WCJ determined that Worker had reached maximum medical improvement for impairments for physical and psychological conditions and sleep apnea. Worker had a combined whole body impairment rating of 43 percent to 46 percent, and the parties agreed that he had a 99 percent permanent partial disability. One ***977** doctor described Worker's pain as "high intensity multiple-site chronic muscle, joint, and nerve pain directly resulting from back injury, followed by failed spinal surgery and attendant myalgia/myositis from resulting compensatory structural imbalances." He considered Worker to be suffering "from some of the most extremely high intensity, frequency, and duration of pain, out of all of the thousands of patients I've treated within my 7 years practicing medicine." At that time, Worker was taking "multiple narcotic based pain relievers [and] multiple anti-depressant medications."

{ 3} On April 8, 2013, Worker filed an application for approval by the WCJ of medical treatment for medical marijuana (application for approval). Worker had been certified for the program by his health care provider and

another medical doctor based on severe chronic pain that was debilitating.

{ 4} After a hearing, and denial of reconsideration, the WCJ found that Worker was "entitled to ongoing and reasonable medical care" with Worker's authorized health care provider and referrals of the health care provider, that Worker was qualified to participate in the medical cannabis program authorized by the Compassionate Use Act, and that participation in the program constituted reasonable and necessary medical care. The WCJ ordered Worker to pay for the authorized medical marijuana to be reimbursed by Employer. Employer appealed.

AUTHORITY FOR MEDICAL MARIJUANA REIMBURSEMENT

[1] { 5} We initially address Employer's argument that the Act and attendant regulations do not authorize the reimbursement of medical marijuana. Because the argument raises a question of interpretation of the Act based on the facts of this case, we review the WCJ's order de novo. *DeWitt v. Rent–A–Center, Inc.*, 2009–NMSC–032, ¶ 14, 146 N.M. 453, 212 P.3d 341. We apply the plain meaning of the words of a statute when the meaning of the statutory language is "truly clear." *State ex rel. Helman v. Gallegos*, 1994–NMSC–023, ¶ 22, 117 N.M. 346, 871 P.2d 1352. When there is any doubt as to the meaning of the words of the statute—that is, when the meaning of the statute is at all vague, uncertain, ambiguous, or otherwise doubtful—it is "part of the essence of judicial responsibility to search for and effectuate the legislative intent ... underlying the statute." *Id.* ¶¶ 22–23.

{ 6} Under the Act, an employer is required to provide an injured worker "reasonable and necessary health care services from a health care provider." Section 52–1–49(A). "Health care provider" is defined in the Act with a listing of various types of providers that includes hospitals, doctors, nurses, and therapists. NMSA 1978, § 52–4–1 (2007). In 2007, the list was amended to add licensed pharmacists and athletic trainers. The list does not include a dispenser of medical marijuana under the Compassionate Use Act. Section 52–4–1(H), (O). Section 52–4–1(P) does include as a health care provider "any person or facility that provides health-related services in the health care industry, as approved by the director" of the Workers' Compensation Administration (WCA), but it is undisputed that the director has not approved a dispenser of medical marijuana as a health care provider under this provision.

{ 7} The director of the WCA has adopted regulations pursuant to NMSA 1978, Section 52–4–5 (1993) and NMSA 1978, Section 52–5–4 (2003). The regulations applicable when Worker filed his application for approval incorporated both statutory provisions and defined "health care provider" as "any person, entity, or facility authorized to furnish health care to an injured or disabled worker pursuant to NMSA 1978, Section 52–4–1, including any provider designated pursuant to NMSA 1978, Section 52–1–49." 11.4.7.7(W) NMAC (12/31/2011). The regulations further defined "services" as "health care services, ... procedures, drugs, products or items provided to a worker by an HCP [health care provider], pharmacy, supplier, caregiver, or freestanding ambulatory surgical center which are reasonable and necessary for the evaluation and treatment of a worker with an injury or occupational disease covered under [the Act] or the New Mexico Occupational Disease Disablement Law." 11.4.7.7(SS) NMAC (12/31/2011).

***978** **[2]** { 8} The regulations address the situation before us in which a health care provider recommends that a worker obtain a product that is reasonable and necessary for the worker's treatment but which, because of its nature, may not be available from another health care provider. In this case, the product is medical marijuana that is subject to the Compassionate Use Act.

{ 9} The WCJ found that Worker's "[p]articipation in a course of cannabis in the New Mexico [M]edical Cannabis Program would constitute reasonable and necessary medical care." Dr. Belyn Schwartz, Worker's health care provider, recommended the services and provided the medical certification form necessary under rules adopted pursuant to the Compassionate Use Act for Worker to participate in the program. *See* § 26–2B–7(A) (requiring the New Mexico Department of Health to adopt rules to implement the Compassionate Use Act). Dr. David Peters also provided a certification form.

{ 10} Section 52–1–49(A) requires an employer to provide a worker "reasonable and necessary health care services from a health care provider." Employer argues that the services ordered by the WCJ do not fall within Section 52–1–49 because the services are provided by the program, which is not recognized by the director as a health care provider. However, the regulations do not support Employer's argument. By defining "services" as including a product from a supplier that is reasonable and necessary for a worker's treatment, the regulations do not contemplate that every aspect of a worker's reasonable and necessary treatment be directly received from a health care provider. Such a requirement would be unworkable. A worker's treatment may well require services that are not available from a health care provider. The most

obvious of such services may be medical supplies or equipment. As contemplated by the regulations, providers other than a health care provider such as a pharmacy (as distinguished from a licensed pharmacist), supplier, or caregiver may provide such services. 11.4.7.7(U) NMAC (12/31/2011). The only prerequisite is that the service be "reasonable and necessary" for the worker's treatment. *Id.* When understood in conjunction with the regulations, Section 52–1–49 requires only that a health care provider have the responsibility for the provision of the reasonable and necessary services, not that each and every service must be provided by a health care provider.

{ 11} Employer also contends that we must view the service in this case as that of a prescription drug rather than as another type of service. A "prescription drug" is defined in the regulations as "any drug, generic or brand name, which requires a written order from an authorized HCP for dispensing by a licensed pharmacist or authorized HCP." 11.4.7.7(OO) NMAC (12/31/2011). Yet, by definition, medical marijuana is not a prescription drug. Although it is a controlled substance, it is not dispensed by a licensed pharmacist or a health care provider upon a written order of a health care provider. A doctor may not order medical marijuana but may certify a patient to enroll in the medical cannabis program. Section 26–2B–3 (14). The program is not a licensed pharmacist or a health care provider. To Employer, the fact that the program is not a licensed pharmacist or a health care provider is the reason that the WCJ's order does not comply with the Act or the regulations. But this argument rests on the basis that the definition of a prescription drug is the only manner by which the WCJ could order Employer's reimbursement of medical marijuana. It does not take into account the definition of "services." That definition is significantly broader than the definition of prescription drug. It includes non-prescription drugs and other products and further includes providers other than licensed pharmacists and health care providers. There is no basis in the regulations to declare that the definition of prescription drug is the exclusive manner to address the provision of medical marijuana to an injured worker.

{ 12} Moreover, if we were to apply the definition of prescription drug as a model for medical marijuana, our analysis would lead to the same conclusion. Indeed, medical marijuana is a controlled substance and is a drug. Instead of a written order from a health care ***979** provider, it requires the functional equivalent of a prescription—certification to the program. Although it is not dispensed by a licensed pharmacist or health care provider, it is dispensed by a licensed producer through a program authorized by the Department of Health. The control that underlies the dispensing of a prescription drug in the regulations, requiring either a licensed pharmacist or a recognized health care provider, is present because of the Department of Health licensing provisions mandated by the Compassionate Use Act. *See* § 26–2B–3(D) (requiring a "licensed producer" of medical marijuana to be licensed by the Department of Health). We note that prior to 2007, a licensed pharmacist was not listed as a health care provider, even though the regulation defining a prescription drug was the same as it was for the purposes of this case and permitted a licensed pharmacist to dispense a prescription drug. *See* 2007 N.M. Laws, ch. 328, § 3(O) (adding "a pharmacist licensed pursuant to the provisions of Chapter 61, Article 11 NMSA 1978" to the listing of health care providers in Section 52–4–1); 11.4.7.7(OO) NMAC (12/31/2011) (defining "prescription drug" as "any drug, generic or brand name, which requires a written order from an authorized HCP for dispensing by a licensed pharmacist or authorized HCP").

{ 13} In this regard, we further observe the legislative intent of the Compassionate Use Act "to allow the beneficial use of medical cannabis in a regulated system for alleviating symptoms caused by debilitating medical conditions and their medical treatments." Section 26–2B–2. The Legislature has provided in the Act that a worker receive through an employer reasonable and necessary health care services, which the regulations define to include "drugs, products or items provided to a worker" in various ways provided that they are "reasonable and necessary for the evaluation and treatment of a worker." 11.4.7.7(SS) NMAC (12/31/2011); Section 52–1–49(A). When read together, we view the legislative intent to be that a worker's treatment under a program authorized by the Compassionate Use Act that has been determined by a WCJ to be reasonable and necessary treatment is embraced within the Act. *See State v. Almanzar*, 2014–NMSC–001, ¶ 15, 316 P.3d 183 (stating that the interpretation of a statute is informed by its function within a comprehensive legislative scheme); *State v. Rivera*, 2004–NMSC–001, ¶ 13, 134 N.M. 768, 82 P.3d 939 (stating that wherever possible we must read legislative enactments as harmonious instead of contradictory); 1A Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction*, § 31:6, at 696–705 (7th ed.2009) (stating that the general rules of statutory interpretation apply to regulations); *see* NMSA 1978, § 52–5–1 (1990) ("It is the intent of the [L]egislature [that the Act] be interpreted to assure the quick and efficient delivery of indemnity and medical benefits to injured and disabled workers at a reasonable cost to the employers[.]").

CONFLICT WITH FEDERAL LAW

{ 14} Employer argues that the order by the WCJ is illegal because Employer would be required to violate federal law in reimbursing Worker for his medical marijuana expenses. Additionally, Employer argues that the order of the WCJ is contrary to federal public policy as expressed by the Controlled Substances Act (CSA), 21 U.S.C. §§ 801–904 (2012).

[3] { 15} Under the CSA, marijuana is classified as a Schedule I controlled substance and, as such, it is generally illegal to use or possess it except as related to federally approved research. 21 U.S.C. §§ 812, 822, 823(f). There is no exemption under federal law for medical uses. *See Gonzales v. Raich*, 545 U.S. 1, 27–28, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005). As follows from *Gonzales*, the Supremacy Clause dictates that any conflict between the Compassionate Use Act and the CSA would be resolved in favor of the CSA. *See Gonzales*, 545 U.S. at 29, 125 S.Ct. 2195 (stating that state law bows to federal law under the Supremacy Clause to the extent that there is conflict). But this case is unlike *Gonzales* because *Gonzales* resolved a direct conflict between the CSA and state law authorizing marijuana use and cultivation for medical purposes that this case does not present. *See Gonzales*, 545 U.S. at 5, 125 S.Ct. 2195. Employer does not attempt to challenge the legality of the Compassionate ***980** Use Act. Instead, Employer asserts that, because marijuana remains a controlled substance under federal law, the order to reimburse Worker for money spent purchasing a course of medical marijuana "essentially requires" Employer to commit a federal crime. However, Employer does not cite to any federal statute it would be forced to violate, and we will not search for such a statute. *See Headley v. Morgan Mgmt. Corp.*, 2005–NMCA–045, ¶ 15, 137 N.M. 339, 110 P.3d 1076 ("We will not review unclear arguments, or guess at what [a party's] arguments might be.").

[4] { 16} Employer also argues that the order should be reversed because it is contrary to federal public policy as reflected in the CSA and *Gonzales.* Worker contends that federal public policy supports medical marijuana because the Department of Justice has announced a somewhat deferential enforcement policy. Although not dispositive, we note that the Department of Justice has recently offered what we view as equivocal statements about state laws allowing marijuana use for medical and even recreational purposes. On one hand, the Department of Justice affirmed that marijuana remains illegal under the CSA and that federal prosecutors will continue to aggressively enforce the statute. But, on the other hand, and in the same documents, the Department of Justice identified eight areas of enforcement priority[1] and indicated that outside of those priorities it would generally defer to state and local authorities. In addition, the Department of Justice stated that it informed the Governors of Washington and Colorado, two states that voted to legalize possession of marijuana and regulate its production and distribution, that it would defer its right to challenge those laws. We also observe that New Mexico public policy is clear. Our State Legislature passed the Lynn and Erin Compassionate Use Act "to allow the beneficial use of medical cannabis in a regulated system for alleviating symptoms caused by debilitating medical conditions and their medical treatments." Section 26–2B–2. We decline to reverse the order on the basis of federal law or public policy.

[1] The eight identified areas of enforcement are:

(1) Preventing the distribution of marijuana to minors;

(2) Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;

(3) Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;

(4) Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;

(5) Preventing violence and the use of firearms in the cultivation and distribution of marijuana;

(6) Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;

(7) Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands;

(8) Preventing marijuana possession or use on federal property. Memorandum from James M. Cole, Deputy Attorney General, to All United States Attorneys, Guidance Regarding Marijuana Enforcement (August 29, 2013).

CONCLUSION

{ 17} For the foregoing reasons, we affirm the order of the WCJ.

{ 18} **IT IS SO ORDERED.**

WE CONCUR: CYNTHIA A. FRY, and

VIGIL, Judges. 331 P.3d 975, 2014 -NMCA- 084

All Citations

CONSOLIDATED APPROPRIATIONS ACT, 2016

Public Law 114–113
114th Congress

An Act

Dec. 18, 2015
[H.R. 2029]

Making appropriations for military construction, the Department of Veterans Affairs, and related agencies for the fiscal year ending September 30, 2016, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Consolidated Appropriations Act, 2016.

SECTION 1. SHORT TITLE.

This Act may be cited as the "Consolidated Appropriations Act, 2016".

SEC. 2. TABLE OF CONTENTS.

The table of contents of this Act is as follows:

1 USC 1 note.

SEC. 3. REFERENCES.

Except as expressly provided otherwise, any reference to "this Act" contained in any division of this Act shall be treated as referring only to the provisions of that division.

SEC. 4. EXPLANATORY STATEMENT.

The explanatory statement regarding this Act, printed in the House of Representatives section of the Congressional Record on or about December 17, 2015 by the Chairman of the Committee on Appropriations of the House, shall have the same effect with respect to the allocation of funds and implementation of divisions A through L of this Act as if it were a joint explanatory statement of a committee of conference.

SEC. 5. STATEMENT OF APPROPRIATIONS.

The following sums in this Act are appropriated, out of any money in the Treasury not otherwise appropriated, for the fiscal year ending September 30, 2016.

SEC. 6. AVAILABILITY OF FUNDS.

Each amount designated in this Act by the Congress for Overseas Contingency Operations/Global War on Terrorism pursuant to section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985 shall be available (or rescinded, if applicable) only if the President subsequently so designates all such amounts and transmits such designations to the Congress.

SEC. 7. TECHNICAL ALLOWANCE FOR ESTIMATING DIFFERENCES.

If, for fiscal year 2016, new budget authority provided in appropriations Acts exceeds the discretionary spending limit for any category set forth in section 251(c) of the Balanced Budget and Emergency Deficit Control Act of 1985 due to estimating differences with the Congressional Budget Office, an adjustment to the discretionary spending limit in such category for fiscal year 2016 shall be made by the Director of the Office of Management and Budget in the amount of the excess but the total of all such adjustments shall not exceed 0.2 percent of the sum of the adjusted discretionary spending limits for all categories for that fiscal year.

SEC. 8. CORRECTIONS.

The Continuing Appropriations Act, 2016 (Public Law 114–53) is amended—

(1) by changing the long title so as to read: "Making continuing appropriations for the fiscal year ending September 30, 2016, and for other purposes.";

(2) by inserting after the enacting clause (before section 1) the following: "**DIVISION A—TSA OFFICE OF INSPECTION ACCOUNTABILITY ACT OF 2015**";

training, assessment, review, or other routine purposes related to a project funded by the grant or contract.

(e) None of the funds made available in this Act may be used for travel and conference activities that are not in compliance with Office of Management and Budget Memorandum M–12–12 dated May 11, 2012 or any subsequent revisions to that memorandum.

SEC. 536. None of the funds made available by this Act may be obligated or expended to implement the Arms Trade Treaty until the Senate approves a resolution of ratification for the Treaty.

SEC. 537. The head of any executive branch department, agency, board, commission, or office funded by this Act shall require that all contracts within their purview that provide award fees link such fees to successful acquisition outcomes, specifying the terms of cost, schedule, and performance.

SEC. 538. Notwithstanding any other provision of this Act, none of the funds appropriated or otherwise made available by this Act may be used to pay award or incentive fees for contractor performance that has been judged to be below satisfactory performance or for performance that does not meet the basic requirements of a contract.

SEC. 539. (a) None of the funds made available by this Act may be used to relinquish the responsibility of the National Telecommunications and Information Administration, during fiscal year 2016, with respect to Internet domain name system functions, including responsibility with respect to the authoritative root zone file and the Internet Assigned Numbers Authority functions.

(b) Nothwithstanding any other law, subsection (a) of this section shall not apply in fiscal year 2017.

SEC. 540. No funds provided in this Act shall be used to deny an Inspector General funded under this Act timely access to any records, documents, or other materials available to the department or agency over which that Inspector General has responsibilities under the Inspector General Act of 1978, or to prevent or impede that Inspector General's access to such records, documents, or other materials, under any provision of law, except a provision of law that expressly refers to the Inspector General and expressly limits the Inspector General's right of access. A department or agency covered by this section shall provide its Inspector General with access to all such records, documents, and other materials in a timely manner. Each Inspector General shall ensure compliance with statutory limitations on disclosure relevant to the information provided by the establishment over which that Inspector General has responsibilities under the Inspector General Act of 1978. Each Inspector General covered by this section shall report to the Committees on Appropriations of the House of Representatives and the Senate within 5 calendar days any failures to comply with this requirement.

SEC. 541. The Department of Commerce, the National Aeronautics and Space Administration, and the National Science Foundation shall provide a quarterly report to the Committees on Appropriations of the House of Representatives and the Senate on any official travel to China by any employee of such Department or agency, including the purpose of such travel.

SEC. 542. None of the funds made available in this Act to the Department of Justice may be used, with respect to any of

the States of Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, Wisconsin, and Wyoming, or with respect to the District of Columbia, Guam, or Puerto Rico, to prevent any of them from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana.

SEC. 543. None of the funds made available by this Act may be used in contravention of section 7606 ("Legitimacy of Industrial Hemp Research") of the Agricultural Act of 2014 (Public Law 113–79) by the Department of Justice or the Drug Enforcement Administration.

This division may be cited as the "Commerce, Justice, Science, and Related Agencies Appropriations Act, 2016".

DIVISION C—DEPARTMENT OF DEFENSE APPROPRIATIONS ACT, 2016

Department of Defense Appropriations Act, 2016.

TITLE I

MILITARY PERSONNEL

MILITARY PERSONNEL, ARMY

For pay, allowances, individual clothing, subsistence, interest on deposits, gratuities, permanent change of station travel (including all expenses thereof for organizational movements), and expenses of temporary duty travel between permanent duty stations, for members of the Army on active duty (except members of reserve components provided for elsewhere), cadets, and aviation cadets; for members of the Reserve Officers' Training Corps; and for payments pursuant to section 156 of Public Law 97–377, as amended (42 U.S.C. 402 note), and to the Department of Defense Military Retirement Fund, $41,045,562,000.

MILITARY PERSONNEL, NAVY

For pay, allowances, individual clothing, subsistence, interest on deposits, gratuities, permanent change of station travel (including all expenses thereof for organizational movements), and expenses of temporary duty travel between permanent duty stations, for members of the Navy on active duty (except members of the Reserve provided for elsewhere), midshipmen, and aviation cadets; for members of the Reserve Officers' Training Corps; and for payments pursuant to section 156 of Public Law 97–377, as amended (42 U.S.C. 402 note), and to the Department of Defense Military Retirement Fund, $27,835,183,000.

MILITARY PERSONNEL, MARINE CORPS

For pay, allowances, individual clothing, subsistence, interest on deposits, gratuities, permanent change of station travel (including all expenses thereof for organizational movements), and